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**To Face Down Dixie:  
South Carolina's War on the  
Supreme Court, 1954-1970**

**James Owen Heath**

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## **Abstract**

South Carolina offers a history of defiant politicians who sought to protect their state from federal interference. With the Supreme Court handing down some of the most important rulings in US history, including *Brown* (1954), *Baker* (1962) and *Miranda* (1966), three South Carolinian Senators – Olin Johnston, Strom Thurmond and Ernest ‘Fritz’ Hollings – waged war on the Court through the judicial nominations process. In scrutinising presidential nominations and attempting to restrict the power of the Court, these Senators played leading roles in the most explosive confirmation battles in recent history, including those of Thurgood Marshall, Abe Fortas and Clement Haynsworth. The South Carolinians defied not only the Democratic Party leadership but also time-honoured Senate traditions of hierarchy and seniority. In maintaining their conservative credentials, they ensured continuous re-election, yet the dominance of the state’s conservative segregationist political establishment, which maintained control of South Carolina’s legislature, drowned out the moderate voices that remained critical of each Senator’s obstructionism. A comparative lack of violence has been identified in South Carolina’s transition to ‘integration with dignity’, but the behaviour of the state’s Senators in the nominations process in Washington, DC was anything but dignified or peaceful. In fact, South Carolina has played the most important, and overlooked, role in the development of Supreme Court nomination hearings into political, and confrontational, public events. The state’s war on the Court would transcend ‘massive resistance’ to civil rights, highlighting questions of law and order, obscenity, communist subversion and school prayer in a radical, ground-breaking response to the Court’s role as the final arbiter of policy. Furthermore, the South Carolinian experience suggests that existing studies of Supreme Court nominations as ‘one-off’ events are narrow and restrictive, and the practice of emphasising the final vote on a nominee’s confirmation or rejection is unhelpful in understanding this complex process.

## **INTRODUCTION:**

### **And The Chips Did Fall ...**

### **South Carolina and the Supreme Court**

The United States Supreme Court is one of the most powerful political institutions in the world. Comprised of nine Justices, each appointed by the President and approved by a majority of the US Senate, the Supreme Court has transformed the American polity on countless occasions by imposing its authority when five or more Justices consider states or other institutions to be in violation of the words of the United States Constitution.

Throughout the twentieth and into the twenty-first century, the Supreme Court has reached across the full spectrum of American political issues, shaping the course of political development in gun politics, abortion, race and affirmative action, religion in schools, presidential authority during wartime, capital punishment, executive privilege, gay rights, and, in December 2000, the outcome of a presidential election. Justices who are idolised by conservatives tend to endure intense vilification from liberals, and Justices who are praised for remaining faithful to the original intentions of the nation's Founding Fathers are inevitably condemned in equal measure for being out of touch, reactionary, and intolerant of minority rights. The question of whether or not the Supreme Court is too powerful is, inevitably, complicated by the polarised nature of American politics in the early twenty-first century: the term 'judicial restraint' is adopted by both liberals and conservatives to indicate a particular perception of sensible behaviour on the part of the Justices, while the pejorative term 'judicial activism' is frequently adopted by both groups to indicate an intolerable political intrusion

by a Court which has misused its authority and taken the policy-making process away from Congress, the legislative branch.<sup>1</sup>

During the twentieth century, the resentment of the Southern states of the landmark *Brown v. Board of Education of Topeka* decision became the ultimate example of a collective political resistance to the power of the Supreme Court. The 1954 decision, in which the Justices ruled that racially segregated schools could no longer be maintained when judged against the wording of the US Constitution, proved to be a political bombshell for Southern leaders, most of whom viewed the Court's judgement as a direct threat to the 'Southern' way of life. The ensuing Southern struggle to curb the power of the Supreme Court involved continuous efforts by the region's leaders to impeach the Justices; to link the Court's decisions to the communist threat; to nullify the Court's authority in matters relating to schooling; to change the conditions for nominating judges to the Supreme Court, and to impose the doctrine of 'interposition' – James Madison's notion of states retaining the right and duty to prevent unreasonable federal interference – as a barrier between the Southern states and the Court's authority.

In the US Senate, where two Senators represent each state, the formation of a Southern anti-Court 'bloc' experienced little or no success in reining in the Court's power during the period 1954-1970. While Article I of the Constitution provides for the power of the Senate in ten lengthy sections (including a list of enumerated powers in Section 8), the paltry three sections of Article III leave the Supreme Court relatively unencumbered by constitutional limitations. Nonetheless, with seats on the Senate Judiciary Committee, Southern Senators James Eastland (Mississippi), John McClellan (Arkansas), Sam Ervin (North Carolina), Strom Thurmond (South Carolina), and Olin D. Johnston (South Carolina)

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<sup>1</sup> See Laurence Tribe, *God Save This Honorable Court* (New York, NY: Random House, 1985), p.100-3, for a brief discussion of the relevance of these terms in the nomination process for Supreme Court Justices. See also Bob Woodward and Scott Armstrong, *The Brethren* (New York, NY: Simon and Schuster, 1979); Ronald Kahn and Kenneth I. Kersch (eds.) *The Supreme Court and American Political Development* (Lawrence, KS: University Press of Kansas, 2006); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004); Alpheus T. Mason, *The Supreme Court from Taft to Warren* (New York, NY: W Norton, 1958); John R. Schmidhauser, *The Supreme Court: Its Politics, Personalities and Procedures* (New York, NY: Holt, Rinehart and Winston, 1960); and John R. Schmidhauser and L. L. Berg, *The Supreme Court and Congress* (New York, NY: Free Press, 1972).



were able to use their powers under Article II, Section 2 of the Constitution to advise on and consent to the confirmation of individuals nominated by the President for vacancies on the Supreme Court. Even if the Southern 'bloc' proved incapable of organising a majority of Senators from other regions to oppose Supreme Court nominees considered unacceptable to the South, the Southern Judiciary Committee members were at least able to reassure their constituents at home that they were acting in the best interests of the 'Southern' way of life. The 1950s witnessed an intensification in the Committee's scrutiny of potential Supreme Court Justices, with many nominees receiving a sharp, provocative and angry line of questioning from Southern Senators on issues relating to police powers, communist subversion and racial segregation. Indeed, this was an era in which a string of nominees – including Thurgood Marshall, the charismatic black lawyer who had convinced all nine Justices to overturn the constitutionality of racially segregated schools in *Brown* – would be forced to face down Dixie before taking their seat on the federal bench.<sup>2</sup>

Senators from the state of South Carolina proved particularly indignant in their response to *Brown*. Olin D. Johnston, Strom Thurmond and Ernest 'Fritz' Hollings would each exert an extraordinary influence over the nomination of Supreme Court Justices, using a variety of methods, including advice to the nominating President; the triggering of investigations into nominees' backgrounds as a delaying tactic, or simply a test of the nominee's composure, stamina and constitutional knowledge in the form of gruelling Q&A sessions before the Senate Judiciary Committee. As the thesis will assert, South Carolina's war on the Supreme Court was very much in the tradition of the state's history of defiance in the assertion of conservative white Southern values.

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<sup>2</sup> See, generally, L.A. Scott Powe, 'The Senate and the Court: Questioning a Nominee', *Texas Law Review* 54 (1975-6), pp.891-902.

## **Research Objectives and Contribution to Scholarship**

In analysing the influence of South Carolina's Senators in the Supreme Court nomination process during the period 1954-1970, the thesis offers original contributions to the existing scholarship by focusing on the following six research objectives:

(1) It will be established in Chapters Four, Five and Six that, of all states, South Carolina has played the most important (yet overlooked) role in the development of Supreme Court nomination hearings into political, and confrontational, public events;

(2) Given that a state's influence within the process of senatorial consideration of judicial nominees may result in that state's political agenda achieving disproportionate importance on a national scale, it will be argued in Chapters Three, Four and Five that South Carolina provided the best example of this phenomenon throughout a lengthy period in the era of civil rights;

(3) The impressive long-term solidarity and consistency of South Carolina's senatorial partnerships in the nomination process suggests – for reasons which will be explained in Chapters Five, Six and Seven – that analysing Supreme Court nominations as 'one-off' events is restrictive and unhelpful;

(4) The thesis brings together the Supreme Court nomination process with the study of Southern political history – two worlds of the existing US politics literature which have rarely, if ever, been studied together. This approach will be most evident, for reasons which will be explained, in Chapters Two, Four and Seven;

(5) The thesis offers, for the first time, a thorough and objective study – with an in-depth analysis of archive material – of a ten-year period in the life and career of Olin D. Johnston following his election to the US Senate. Chapters Two and Three will highlight the significance of this overlooked Southern statesman in the relationship between judicial politics and Southern political history;

(6) In addition to influencing and defining the growing tensions within the nomination process for Supreme Court Justices, the actions of South Carolina's Senators had the very same effect on the intense politicisation of appointments to the lower courts, as will be explained in Chapters Two, Three and Five.

There will be a review of research objectives within each of the chapters which follow, in order to establish the historical and political significance of each instalment in the story of South Carolina and the Supreme Court.

Having provided an outline of the research, and set out the objectives of the thesis, this introductory chapter will now offer a brief political history of the state of South Carolina in order to contextualise the subject analysed in the following chapters. From here, the chapter will turn to a brief biographical outline of the three Senators under study. The chapter will then explain the importance of the Supreme Court nomination process in some detail, before outlining the nature and scope of the primary research used to complete each of the main chapters. This chapter then concludes with a brief overview of how the thesis will proceed.

### **Rationale for Research: Why South Carolina?**

The view of historian James Haw that South Carolina's antebellum leaders created an image of a superior Southern civilization provides a useful starting point for an examination of the South Carolinian sense of 'exceptionalism' which characterises the state's history.<sup>3</sup> As Jack Bass and Marilyn Thompson have argued, the South Carolinian distrust of executive power originates from the colonial era, when the Governor was appointed by the King of England, an experience which influenced the decision to concentrate political power within the state's legislature, making South Carolina's Governor, until recently, one of the weakest Governors in the

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<sup>3</sup> Charles W. Joyner, 'Shared Traditions: South Carolina as a Folk Culture', in Roger Figueira and Stephen Lowe (eds.), *Proceedings of the South Carolina Historical Association* (Columbia, SC: South Carolina Historical Association), p.9, cited in Jack Bass and W. Scott Poole, *The Palmetto State: The Making of Modern South Carolina* (Columbia, SC: University of South Carolina Press, 2009), p.27.

United States.<sup>4</sup> In addition to a sense of separatism, if not outright secession, a strong tradition of defiance permeates South Carolina's history: the image of the palmetto tree was adopted for the state flag in honour of the soft, spongy palmetto log walls of Fort Sumter, which absorbed the shock of British cannonballs without shattering when nine British ships attempted to enter Charleston Harbour on 28<sup>th</sup> June 1776.<sup>5</sup> With African slaves responsible for over half the annual value of South Carolina's exports, the state's leaders sought to ensure the continuation of a thriving economy while at the same time easing white fears of the state's black slave majority, which became a greater concern after the failed Stono Rebellion of 1739.<sup>6</sup> The wealth achieved through the enormous success of the South Carolinian slave economy, fuelled by rice and indigo exports, gave the state an influential voice in national politics which South Carolina's leaders wished to maintain.<sup>7</sup>

Following the Nullification Crisis, during which the state bitterly rejected the Tariff of 1828, South Carolina's relationship with national party politics was damaged irreparably, to the extent that, by 1860, Robert Barnwell Rhett, editor of *The Charleston Mercury*, expressed hope that Abraham Lincoln's election victory would create a Southern backlash which would lead to the break-up of the Union and the establishment of a separate Southern nation.<sup>8</sup> Given its long tradition of independence, it seems unsurprising that South Carolina became the first state to secede from the Union in December 1860, triggering the Civil War.

From the 1890s, South Carolina would implement one of the most savage and uncompromising systems of Jim Crow segregation in the American South, and the principle of ensuring white supremacy would continue to characterise the state's cultural and political identity long after the abolition of slavery and the

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<sup>4</sup> Jack Bass and Marilyn W. Thompson, *Strom: The Complicated Personal and Political Life of Strom Thurmond* (New York, NY: Public Affairs, 2005), p.42; V.O. Key, *Southern Politics in State Nation* (New York, NY: Vintage, 1949), p.150; Jamie W. Moore, 'The Lowcountry in Economic Transition: Charleston Since 1865', *The South Carolina Historical Magazine* 80:2 (April 1979), pp.156-171, p.157.

<sup>5</sup> Bass and Poole, *Palmetto State*, p.15.

<sup>6</sup> David Brown and Clive Webb, *Race in the American South: From Slavery to Civil Rights* (Edinburgh: Edinburgh University Press, 2007), p.36; p.41-2; p.72; Bass and Poole, *Palmetto State*, p.9-10.

<sup>7</sup> Robert Mickey, *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015), p.65.

<sup>8</sup> Walter Edgar, *South Carolina: A History* (Columbia, SC: University of South Carolina Press, 1998), p.337-8; Bass and Poole, *Palmetto State*, p.42.

failure of the ill-fated Reconstruction-era reforms. During the early twentieth century, South Carolina's politicians openly exploited the presence of a black majority in certain counties in order to secure re-election: arch segregationist Senator 'Cotton Ed' Smith was returned to the US Senate continuously over a thirty-four year period by conservative white voters in the state's 'black belt' region.<sup>9</sup> Following the announcement of *Brown*, black belt cities such as Orangeburg, which had a 70% African American population in the mid-1950s, would become centres of activity for the white Citizens' Councils, which were created primarily as a means of opposing the racial integration of Southern schools.<sup>10</sup> The ongoing persistence of white supremacy had become so deeply ingrained in South Carolina's cultural identity by the 1950s that, in the words of C. Vann Woodward, African Americans felt 'little need for Jim Crow laws to establish what the lingering stigma of slavery – in bearing, speech and manner – made so apparent.'<sup>11</sup>

South Carolina became one of only two states to impose segregation in hospitals, and the only state which segregated a third caste by establishing separate schools for 'mulatto' as well as 'white' and 'Negro' children.<sup>12</sup> The frequent call of South Carolina's demagogic politicians, in particular the notorious Coleman L. Blease, for the use of violence to maintain racial order resulted in a total of 155 lynchings during the period 1880-1930.<sup>13</sup> The state's notoriety for racial violence even stirred the Presidency into action: after a black veteran named Isaac Woodard suffered a blow to the face from a policeman during an incident in Batesburg, which left him permanently blinded in one eye, President Harry S. Truman created a Committee on Civil Rights.<sup>14</sup> Racial violence would

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<sup>9</sup> Key, *Southern Politics*, p.143.

<sup>10</sup> John W. White, 'The White Citizens' Councils of Orangeburg County, South Carolina', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.261-273; p.261; Bass and Poole, *Palmetto State*, p.93; Mickey, *Paths*, p.223.

<sup>11</sup> C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford: Oxford University Press, 1974), p.32.

<sup>12</sup> Earl Black, *Southern Governors and Civil Rights* (Cambridge, MA: Harvard University Press, 1976), p.81; Woodward, *Strange Career*, p.99; p.102.

<sup>13</sup> Bruce Baker, *This Mob Will Surely Take My Life: Lynchings in the Carolinas, 1871-1947* (London: Continuum, 2008), p.4.

<sup>14</sup> Brown and Webb, *Race in the American South*, p.264; Kari Frederickson, "'The Slowest State' and 'Most Backward Community': Racial Violence in South Carolina and Federal Civil Rights Legislation, 1946-48", *The South Carolina Historical Magazine* 98:2 (1997), pp.177-202, p.198.

persist despite Truman's intervention, prompting one South Carolinian minister to remark in 1957 that 'fear covers South Carolina like the frost.'<sup>15</sup>

The legendary V.O. Key, whose 1949 assessment of South Carolina remains the most insightful study of the state's politics after an incredible sixty-six years, highlighted one particularly important reflection that assists in explaining the state's virulent defence of white supremacy. As established in the Constitution of 1890, the system of apportionment that applied to the State Senate – namely, one Senator per county – gave the conservative politicians of the state's lowcountry counties an ironclad control over South Carolina's internal politics. Enjoying a higher rate of incumbency than Congressmen from upcountry counties, the lowcountry politicians reaped the benefits of seniority through chairing various committees, resulting in a situation in which large numbers of white voters in upcountry counties were at a disadvantage in terms of their congressional representation, while the counties of the lowcountry – with comparatively small numbers of white voters but sizeable, disenfranchised, black majorities – were represented by the most powerful politicians in the state.<sup>16</sup> As Bryant Simon has shown, the effects of South Carolina's malapportionment only worsened with the large-scale migration of the state's residents from rural to metropolitan areas during the early twentieth century, constituting 'a dilution of democracy, even racially skewed democracy' even when compared to similar systems in place in other states.<sup>17</sup>

As a result, the state's political character, at least as it applied to elected representatives, was defined to a great extent by the preferences of white voters residing in counties 'with the highest proportions of Negroes.'<sup>18</sup> South Carolina's relatively weak Governors were, therefore, hamstrung, if not at the mercy of, a deeply conservative state legislature which, in the words of Key, 'grasped firm

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<sup>15</sup> Stan Opatowsky, 'Dixie Dynamite: The Inside Story of the White Citizens Councils' (reprinted from *New York Post*, 6–20 Jan 1957), p.12; Michael J. Klarman, 'Why Massive Resistance?' in Clive Webb (ed.), *Massive Resistance: Southern Opposition to the Second Reconstruction* (Oxford: Oxford University Press, 2005), pp.21–34, p.25.

<sup>16</sup> Key, *Southern Politics*, p.150–5. Bryant Simon, 'The Devaluation of the Vote: Legislative Apportionment and Inequality in South Carolina, 1890–1962', *The South Carolina Historical Magazine* 101:3 (July 2000), pp.234–252; p.247–8.

<sup>17</sup> Simon, 'The Devaluation', p.238.

<sup>18</sup> Key, *Southern Politics*, p.139.

control of the critical sectors of state administration.<sup>19</sup> The politicians of Barnwell County, particularly Senator Edgar A. Brown, who served in the State Senate for forty-four years and was referred to by Key as the state's 'prime minister', and Speaker Solomon Blatt, who served in the State House of Representatives for a staggering fifty-four years (thirty-two of them as Speaker), became the embodiment of this phenomenon.<sup>20</sup>

All three of the Senators studied in this thesis were forced to contend with the Barnwell effect during their terms as Governor of South Carolina: Johnston waged a bold but ultimately unsuccessful war with the legislature in a row over the state's Highway Division; Thurmond railed against the 'Barnwell Ring' during his successful election campaign of 1946, and Hollings was forced to charm state legislators (including the ageing Senator Brown) with a bottle of bourbon in order to secure authorisation for his ambitious programme of technical training.<sup>21</sup>

The reflections of Key and subsequent scholars suggest that South Carolina's political elite succeeded not only in constructing an unbreakable conservative dominance of the state's politics but also managed to smother, or at least conceal, the potential for alternative, even moderate, political ideologies to emerge.<sup>22</sup> The version of 'massive resistance' practiced by the state's leaders created, in the words of Tony Badger, 'a closed society, just as closed as Mississippi, in which dissent was not tolerated,' but this is not to suggest that the state had been open to alternative political viewpoints prior to the announcement of *Brown*.<sup>23</sup> As Robert Mickey has explained, South Carolina's response to *Brown* 'did not crush a burgeoning racially moderate public sphere [because] prior to *Brown*, none existed.'<sup>24</sup>

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<sup>19</sup> *Ibid.*, p.151.

<sup>20</sup> Frank E. Jordan, *The Primary State: A History of the Democratic Party in South Carolina, 1896-1962* (self-published; unknown date), p.162-3; Simon, 'The Devaluation', p.248.

<sup>21</sup> John E. Huss, *Senator for the South: A Biography of Olin D. Johnston* (New York: Doubleday, 1961), p.64-72; Jack Bass and Marilyn W. Thompson, *Strom: The Complicated Personal and Political Life of Strom Thurmond* (New York, NY: Public Affairs, 2005), p.78-9; Jack Bass and W. Scott Poole, *The Palmetto State: The Making of Modern South Carolina* (Columbia, SC: University of South Carolina Press, 2009), p.112.

<sup>22</sup> Key, *Southern Politics*, p.131.

<sup>23</sup> Anthony J. Badger, 'From Defiance to Moderation: South Carolina Governors and Racial Change', in Anthony J. Badger, *New Deal/New South: an Anthony J. Badger Reader* (Fayetteville, AR: University of Arkansas Press, 2007), pp.127-143; p.133.

<sup>24</sup> Mickey, *Paths*, p.224.

The current South Carolina political scholarship suggests strongly that aspirants to political office were forced to conform to an intolerant political system in which the racial prejudices of the lowcountry were deeply ingrained. If this is truly the case, it seems surprising that few scholars have considered the full reach of this effect by exploring the impact of South Carolina's racial politics in Washington, DC, particularly as Key has observed that the state's Senators 'used the floor of the United States Senate as a rostrum for white supremacy oratory, matched in virulence mainly by such Mississippi spokesmen as [James K.] Vardaman, [Theodore] Bilbo [and John E.] Rankin.'<sup>25</sup> In fact, the US Senate itself is a highly relevant aspect of South Carolina's history, in that many of the most violent, dramatic and notorious events associated with the state's Senators and the issue of race have taken place on the Senate floor itself, including the infamous Brooks-Sumner incident of 1856, when Congressman Preston Brooks subjected Senator Charles Sumner to a vicious beating with a cane; the recitation in 1929 of the poem *N\*\*\*\*\*s in the White House* by Coleman Blease in reaction to First Lady Lou Hoover taking tea with the wife of African-American Congressman Oscar DePriest, and Strom Thurmond's remarkable twenty-four hour filibuster opposing the Civil Rights Act of 1957, which remains to date the longest recorded filibuster in US history.<sup>26</sup> With South Carolina's powerful conservative leaders unable to exert, at the federal level, a measure of influence on a par with their control over the state legislature, it was perhaps inevitable that the state's Senators would clash repeatedly with Senators from other states in their uncompromising defence of white supremacy.

The healthy South Carolinian distrust of executive power, particularly in matters of race relations, makes it logical that the US Supreme Court would become a target of the state's defiant politicians. The state would find itself at the centre of several landmark Court decisions relating to racial politics, all of which would fuel the protests of South Carolina's politicians that the Justices of the

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<sup>25</sup> Key, *Southern Politics*, p.130.

<sup>26</sup> See David Herbert Donald, *Charles Sumner and the Coming Civil War* (New York, NY: Alfred A Knopf, 1960) for a thorough account of the Brooks-Sumner Incident.



Supreme Court were leading a vindictive attack on the 'Southern' way of life under the leadership of the arch-liberal Chief Justice Earl Warren. The *Brown* decision drew together five cases relating to segregated schooling, among them *Briggs v. Elliott*, which originated from a challenge to segregated schooling in Clarendon County, South Carolina. *Briggs* had been the original case, but, as Orville Vernon Burton has explained, the Court's Texan Justice, Tom C. Clark, suggested that the group of five cases be named after the *Brown* case so that it would not be viewed as dealing solely with a 'Southern' issue, with the result that 'Linda Brown and Topeka became famous, and Harry Briggs and Clarendon, South Carolina, did not.'<sup>27</sup> In defending South Carolina's system of segregated education, the state's counsel, John W. Davis, emphasised the promises made by the state to invest heavily in its schools, with the intention of ironing out the inequalities between black and white children which had been identified during the original oral arguments in *Briggs*, heard two years earlier.<sup>28</sup>

The *Brown* decision, announced on 17<sup>th</sup> May 1954, struck down the established system of segregated education in its entirety and proved to be a hammer blow for the state of South Carolina. The decision voided Article XI, Section 7 of the state's Constitution and also suggested an overwhelming vote of no confidence in Governor James F. Byrnes' pledge to address racial inequalities in South Carolina's schools. While the Attorney General of neighbouring Georgia tried to argue that segregation ought to be maintained in that state because Georgia had had nothing to do with the original group of cases, South Carolina could make no such claim, and would forever be linked with one of the most controversial Supreme Court decisions of the twentieth century.<sup>29</sup> Further decisions followed: on 25<sup>th</sup> February 1963, the Court handed down its opinion in *Edwards v. South Carolina*, which ruled that South Carolina's authorities had

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<sup>27</sup> Orville Vernon Burton et al., 'Seeds in Unlikely Soil: The *Briggs v. Elliott* School Desegregation Case', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina in the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.176-200; p.190.

<sup>28</sup> John W. Davis, oral argument, as printed in 'In The Supreme Court' booklet, Herman E. Talmadge Collection, Subgroup C, Series 3: Civil Rights, Box 17, Folder 6.

<sup>29</sup> *The Atlanta Constitution*, 18<sup>th</sup> May 1954, p.1, Richard B. Russell Collection, Subgroup C, Series 3: Speech/Media, Box 27, Folder 9.

violated the rights of African American protestors by forcing them to disperse. In January 1966 came *South Carolina v. Katzenbach*, which dismissed South Carolina's challenge to the pre-clearance provisions of the landmark Voting Rights Act of 1965 in an opinion drafted by Earl Warren himself, which has been cited by Jim Newton as an example of the Chief Justice's personal 'campaign against Southern racism.'<sup>30</sup> During oral arguments, Warren cited 'an invidious and pervasive evil' in South Carolina's history of defying the Fifteenth Amendment of the Constitution through disenfranchising African Americans.<sup>31</sup> In December 1965, the Court commanded South Carolina to reconstruct completely its system of representation in the state Senate in order to ensure the representation of African American voters, a challenge later upheld by the *Stevenson v. West* decision of 1975.<sup>32</sup> Despite the obvious obstructionism being neutralised in these decisions, it is not difficult to understand why South Carolinian citizens and politicians might have had compelling reasons to take a greater interest in the affairs of the US Supreme Court than Americans elsewhere in the nation.

One particularly notable aspect of the political interactions of South Carolina and the Supreme Court is the manner in which the state's Senators have been deeply involved in the process of nominating and confirming Justices for seats on the Court, occasionally going to extraordinary lengths to scrutinise or obstruct nominees, or influence the process of selection themselves. As far back as April 1930, an editorial in *The Buffalo Progressive Herald* identified Coleman Blease as a ringleader in the fierce opposition to President Herbert Hoover's nomination of Charles Evans Hughes for the position of Chief Justice.<sup>33</sup> A more famous example is the melodramatic style of questioning employed by Strom Thurmond when scrutinising President Lyndon Johnson's nominations of Thurgood Marshall for Associate Justice in 1967, and Abe Fortas for Chief Justice

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<sup>30</sup> Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York, NY: Riverhead, 2007), p.460-1.

<sup>31</sup> James O. Farmer, 'Memories and Forebodings: The Fight to Preserve the White Democratic Primary in South Carolina', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.243-251; p.244.

<sup>32</sup> Simon, 'The Devaluation', p.251; Edgar, *South Carolina*, p.551.

<sup>33</sup> *The Buffalo Progressive Herald*, Saturday 19 April 1930, Manuscript Division, Library of Congress, Hoover NAACP Records, Parker Hearings, Box 1:C398.

in 1968. More complex is the role of Senator Fritz Hollings, whose personal recommendation to President Richard Nixon that he make the ill-fated nomination of South Carolinian Clement Haynsworth occurred at a time of press speculation that Nixon would 'repay' the Southern states for crucial support during the 1968 Presidential Election, with one newspaper noting Strom Thurmond's 'passionate' interest in matters of the Court.<sup>34</sup>

Perhaps more remarkably, South Carolina has the unusual distinction of being one of the few states in American history to have elected a former Supreme Court Justice as its Governor: James F. Byrnes, who had been appointed to the Supreme Court by President Franklin D. Roosevelt in 1941 before being removed in order to head the Office of Economic Stabilization, had the unenviable task of governing South Carolina during the early 1950s, when the Court announced the *Brown* decision. Byrnes became an outspoken critic of the Court on which he had previously served, condemning his former colleagues in a pamphlet entitled 'The Supreme Court Must Be Curbed!', which was re-printed and circulated extensively throughout South Carolina during the mid-1950s.<sup>35</sup> Given the significance of South Carolina's role in *Briggs v. Elliott*, the prominent role of Senators Thurmond and Hollings in the Fortas and Haynsworth nomination disasters, and the influence of Governor Byrnes (a former Supreme Court Justice and Senator), it is quite clear that South Carolina holds a unique place in the history of the US Supreme Court, and vice versa.

In waging a war on the Court following the announcement of *Brown*, South Carolina's Senators employed a variety of measures aimed at restricting the power of the Justices in order to re-assure their constituents that segregation would be maintained. Olin Johnston was an active participant in efforts to gather information that might be used to discredit the Court's decisions, while Strom Thurmond advocated the impeachment of Supreme Court Justices on an almost regular basis, making a special effort to target the elderly liberal Justice William O.

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<sup>34</sup> 'Carolinian Seen In Line For Court', *The New York Times*, 13<sup>th</sup> August 1969; 'Nixon Gave Thurmond Supreme Court Veto', *Lewiston Daily Sun* (Maine), 20<sup>th</sup> April 1968.

<sup>35</sup> James F. Byrnes, 'The Supreme Court Must Be Curbed!', originally published by *US News and World Report*, 18<sup>th</sup> May 1956, Herman E. Talmadge Collection, Subgroup C, Series 3: Civil Rights, Box 17, Folder 6.

Douglas.<sup>36</sup> In addition, Johnston and Thurmond unleashed a wave of legislation aimed at weakening the Court's power, including a Johnston bill to eliminate the Court's jurisdiction in matters relating to schools, and a Thurmond bill requiring Justices to hold a minimum of five years' judicial experience in order to be eligible for nomination.<sup>37</sup> The legislative element of South Carolina's war on the Court highlights one of the more overlooked aspects of the Southern states' anti-Court agenda: 'court-baiting', rather than race-baiting, could be used by South Carolina's Senators as a convenient means of asserting their state's independence by blaming Presidents of both parties for making disastrous nominations.<sup>38</sup> By using the resistance of northern Senators as a convenient excuse for the South's failure to prevent the Court's interference in the practice of segregation, Southern Senators were able to make a plausible case for their continuous re-election. Southern voters came to believe that the only means of containing the influence of the Supreme Court would be to re-elect their Senators. With re-election came seniority, with seniority came senior positions on Senate committees, and with a senior position on the Judiciary Committee came the power to scrutinise and influence the very process which determines the individuals who sit on that Court.

From 1953 until his death in 1965, Olin Johnston was better placed than any other South Carolinian politician to influence the judicial appointments of Presidents Dwight D. Eisenhower and John F. Kennedy. Having secured a place on the Judiciary Committee thanks to the influence of Senate Minority Leader Lyndon Johnson (who viewed his near-namesake as a natural ally as well as a loyal Democrat), Johnston was frequently selected by fellow Southerner and

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<sup>36</sup> Transcript of James Eastland's Senate speech regarding introduction of Resolution 104, Richard B. Russell Collection Subgroup E, Series 4: Vertical Files, Box 4, Folder 64; letter from Olin D. Johnston to James Eastland, 15<sup>th</sup> March 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, School Segregation; letter from Olin D. Johnston to James Eastland, 15<sup>th</sup> March 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, School Segregation; 'Impeach Justices, Thurmond Urges', *The New York Times*, 8<sup>th</sup> July 1957, p.15; letter from Strom Thurmond to Reverend Henry J. Gambrell, 6<sup>th</sup> June 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1969, Nominations, 3 (United States District, Circuit and Supreme Court), Box 28, Folder 1.

<sup>37</sup> Correspondence between Olin D. Johnston and George Bell Timmerman, 2<sup>nd</sup>-11<sup>th</sup> February 1955, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, School Segregation; telegram from Olin D. Johnston to Speaker Solomon Blatt, 9<sup>th</sup> February 1955, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, School Segregation; Draft of statement in Senate regarding Supreme Court Justice Qualification Bill, 29<sup>th</sup> January 1959, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries A, General File (1935-1983), Statements on the Senate Floor, Box 8, Folder 690.

<sup>38</sup> 'Thurmond Warns Of A Third Party', *The New York Times*, 21 August 1955, p.53.

Committee Chairman James Eastland to sit on sub-committees to assess the suitability of Court of Appeals nominations.<sup>39</sup> In using his position to delay the confirmation of any nominee he considered unsuitable, Johnston made a lasting imprint on the history of the US Senate, marking a period in which Southern Senators utilised Senate procedures to enforce a Southern agenda on a national scale.<sup>40</sup> He was at his most obstructive when considering the Circuit Court nominations of Simon Sobeloff and Thurgood Marshall, both of which were made with the Supreme Court as the backdrop: the latter nomination was made amid speculation that President Kennedy would eventually make Marshall the first African American Supreme Court Justice, while Sobeloff was supposedly being 'groomed' to replace the ailing Justice Felix Frankfurter.<sup>41</sup> Johnston's tactics alienated his Senate colleagues and tested the patience of President Kennedy, who intervened personally in an effort to overcome Johnston's obstruction of the Marshall appointment.<sup>42</sup>

Strom Thurmond preferred a more confrontational approach toward nominees: his aggressive interrogation of Abe Fortas – inspired in part by his fury that the Court had thrown out the conviction of Andrew Mallory, a black South Carolinian man who choked and raped a white woman and went on to re-offend – is immortalised in the now-infamous outburst, 'Mallory – I want that word to ring in your ears.'<sup>43</sup> Fritz Hollings would carve out an equally distinctive record on Supreme Court nominations. His decision, only a few years after establishing himself as one of South Carolina's more moderate Governors, to oppose the Supreme Court nomination of Thurgood Marshall, drew criticism from the state's black leaders, and remains, according to the man himself, one of Hollings's biggest

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<sup>39</sup> Telephone conversation between Lyndon B. Johnson and Olin D. Johnston, 14<sup>th</sup> April 1964, Lyndon B. Johnston Presidential Recordings, Miller Center, University of Virginia, WH6404.09 [<http://millercenter.org/scripps/archive/presidentialrecordings/Johnson>].

<sup>40</sup> US News and World Report, 21<sup>st</sup> March 1960, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390; Merritt, 'The Senatorial Election of 1962', p.254-5.

<sup>41</sup> Letter from Harry N. Johnson to Olin D. Johnston, 18<sup>th</sup> June 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4; David A. Nichols, *A Matter of Justice: Eisenhower and the Civil Rights Revolution* (New York, NY: Simon and Schuster, 2007), p.86.

<sup>42</sup> Press release from the office of Senator Kenneth B. Keating, 30<sup>th</sup> April 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4; 'Nominee Marshall', *The New York Times*, 26 August 1962, p.152.

<sup>43</sup> Bruce Allen Murphy, *Fortas* (New York, NY: William Morrow and Co, Inc., 1988), p.426.

personal regrets.<sup>44</sup> His record on Supreme Court appointments would remain unusually conservative throughout his thirty-eight-year career in the Senate, most notably with regard to President Ronald Reagan's failed nomination of Robert Bork, which Hollings supported despite the opposition of sixteen of his seventeen fellow Southern Democrats.<sup>45</sup>

One of the more remarkable aspects of this story is the manner in which Johnston, Thurmond and Hollings always seemed to agree on the South Carolina position toward each Supreme Court nomination as it was made, yet they did not communicate regularly, nor did they seem to discuss the formulation of a coherent strategy in the state's war on the Court. The relationship between Johnston and Thurmond remained strained following their bitter 1950 primary contest, and Johnston's reluctance to associate himself with Thurmond's racist posturing was summed up neatly in his (possibly apocryphal) remark to Harry Ashmore, editor of the *Arkansas Gazette*: 'It's no use trying to talk to Strom. He believes that shit.'<sup>46</sup> Johnston's daughter, former Congresswoman Elizabeth J. Patterson, recalls, of her father, that 'I never heard him say anything bad about him, OK, but he did say "poor Strom" a couple of times. He just sort of ignored him, I think.'<sup>47</sup> Johnston and Thurmond did not meet regularly, and maintained a cordial written agreement that each would not object to the other's judicial recommendations.<sup>48</sup> Like Thurmond, Hollings would wage a bitter and ultimately unsuccessful effort to unseat Johnston in the 1962 Democratic Party primary contest, and would clash openly with Thurmond during discussions over the extension of the Voting Rights Act in 1982.<sup>49</sup>

In addition to a lack of personal warmth between the three Senators, there were various different political agendas to contend with. While Hollings crafted a reputation as a moderate, Thurmond filibustered against passage of the 1957 Civil

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<sup>44</sup> 'Carolina Negroes Cool to Hollings', *The New York Times*, 4<sup>th</sup> November 1968, p.38; Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008), p.128.

<sup>45</sup> Nicol C. Rae, *Southern Democrats* (Oxford: Oxford University Press, 1994), p.105.

<sup>46</sup> Bass and Thompson, *Strom*, p.165; Badger, 'From Defiance', p.128.

<sup>47</sup> Interview with Liz Patterson, 29<sup>th</sup> September 2014.

<sup>48</sup> Letter from Strom Thurmond to Walter Brown, 14<sup>th</sup> April 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1.

<sup>49</sup> Hollings and Victor, *Making Government Work*, p.210-11.

Rights Act not only to assure his constituents that segregation in South Carolina would be maintained, but also to demonstrate to his Southern colleagues that his commitment to the preservation of white supremacy was stronger and more authentic than theirs.<sup>50</sup> The testosterone-fuelled energy with which South Carolina's politicians have defended their state is quite evident in Thurmond's correspondence with his constituents during the debate over the Civil Rights Act during the summer of 1957, which includes his pledge to 'speak at great length and to the full extent of my physical capacity.'<sup>51</sup>

Thurmond's provocative promotion of the Southern Manifesto – signed by most of the Southern congressional delegation in defiance of *Brown* – led to a physical altercation with Senator Ralph Yarborough of Texas, and his twenty-four-hour filibuster prompted a very public rebuke from the leader of the Southern delegation, Georgia's Richard Russell, who condemned Thurmond's pursuit of 'personal political aggrandizement.'<sup>52</sup> Hollings later claimed that Thurmond's aggressive interrogation of Abe Fortas 'had left even some of his own staffers shaking their heads,' illustrating, as with Johnston's delay of Thurgood Marshall's confirmation, that the actions of South Carolina's Senators often proved to be deeply unpalatable to others in Washington, DC.<sup>53</sup> Furthermore, as this research will indicate, the war waged by South Carolina's Senators was only partially successful in convincing the state's white voters that segregation could be prevented and the Court's power contained.

It will be established through research objective (1) that South Carolina has played the most important (yet overlooked) role in the development of Supreme Court nomination hearings into political, and confrontational, public events. Highlighting the enduring Southern obsession with the Supreme Court in the twenty-first century, former South Carolinian Congressman John Spratt refers to

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<sup>50</sup> Joseph Crescino, *Strom's Thurmond's America* (New York, NY: Hill and Wang, 2012), p.118-9.

<sup>51</sup> Letter from Strom Thurmond to J.R. McVicker, 8<sup>th</sup> July 1957, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Legislature, Year 1957, Box 27, Supreme Court January 3-July 2, 1957; letter from Strom Thurmond to Henry T. Chance, 10<sup>th</sup> July 1957, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Legislature, Year 1957, Box 27, Supreme Court July 3-13, 1957.

<sup>52</sup> 'Russell Leads Attack on Thurmond', *Augusta Chronicle*, 31<sup>st</sup> August 1957, Strom Thurmond Collection, Legislative Assistant Series, Mss.0100.15, Box 140, Richard Russell, August 1957-May 1964.

<sup>53</sup> Hollings and Victor, *Making Government Work*, p.142.

the influence of the nine Justices as 'one of the defining differences. If you want to know the difference between a Democrat and a Southern Democrat, my answer would be that it's about where you stand on the Supreme Court, particularly on recent rulings, such as those dealing with gay rights.'<sup>54</sup> In line with research objective (4), the thesis brings together the history of the Supreme Court nomination process with the study of Southern political history, but once again, the unique role of South Carolina's politicians in the nominations process must be emphasised. Although the states of Arkansas, Mississippi and North Carolina also had ardent segregationist representatives on the Senate Judiciary Committee during this era, none of these Senators ever initiated a one-man crusade against a nominee, as in the case of Johnston's fight against the Court of Appeals nominations of Marshall and Sobeloff, and Thurmond's obstruction of the Supreme Court nominations of Marshall and Fortas. The unyielding dissent of South Carolina's Senators truly stands out from the actions of other segregationists in the nomination process throughout the period under study. Thurmond virtually stood alone in his vote against the confirmation – as Associate Justice – of Abe Fortas in 1965, and his crusade against Thurgood Marshall in 1967 was blunted by Lyndon Johnson's success in convincing Southerners James Eastland, John Stennis, John McClellan and Richard Russell to 'take a walk' by abstaining from the final vote.<sup>55</sup>

Although the influence of the state's politicians on the nominations of Supreme Court Justices has been noted by many scholars, including Thorpe (1969), Murphy (1988), Silverstein (1994), Abraham (1999) and Comiskey (2004), the impact of South Carolina's Senators has never been analysed at a level which might allow insight into the themes discussed above. Given the significant South Carolinian opposition to Charles Evans Hughes's nomination as Chief Justice; the withdrawal of Abe Fortas's nomination, and the Senate rejections of both Clement F. Haynsworth and Robert Bork, it is clear that the influence of South Carolinian Senators has featured prominently in some of the most explosive Supreme Court

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<sup>54</sup> Interview with John Spratt, 28<sup>th</sup> September 2014.

<sup>55</sup> Juan Williams, *Thurgood Marshall* (New York, NY: Random House, 1998), p.337-8.



nomination battles of the twentieth century. Furthermore, the consistency of the state's Senators in the nomination process, and the volatile nature of their actions and behaviour, suggests that South Carolina illustrates best the argument, made in the form of research objective (3), that the frequent analysis of Supreme Court nominations as 'one-off' events is restrictive and unhelpful, for reasons which will be explained.

The significance of South Carolina's role in the *Briggs v. Elliott* case and the prominent role of Senators Thurmond and Hollings in the Fortas and Haynsworth disasters constitute a sufficient rationale for highlighting South Carolina as the most logical choice for a study which looks in detail at the significance of racial politics in the resistance of presidential nominations to the Supreme Court.<sup>56</sup> A full examination of how the state's politicians responded to concerns over judicial nominations is certainly warranted, if only to investigate in detail the connection between political activity in the US Senate and the activities of Southern white communities resisting federal intervention in South Carolinian affairs, particularly with regard to race relations. As noted above in the form of research objective (2), a state's influence within the process of judicial selection may result in that state's political agenda achieving a disproportionate influence on a national scale. With its striking history of political dissent, and its unique relationship with the Supreme Court, South Carolina's influence on the judicial selection process offers a crucial, yet overlooked, example of this phenomenon throughout a lengthy period in the era of civil rights.

Before this introductory chapter proceeds to offer a brief outline of the lives and careers of the Senators under study, it is necessary to make three points regarding the use of the expression 'war on the Supreme Court'. The first is that the expression has been used throughout the thesis to refer to the attempt of South Carolina's Senators to achieve a variety of objectives, including the maintenance of conservative segregationist credentials through regular condemnation of the *Brown* decision; a characterisation of themselves as

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<sup>56</sup> Newton, *Eisenhower*, p.116; Nichols, *A Matter of Justice*, p.78, p.86-8.

defenders of the South against an institution purported to be the region's number one enemy, and an attempt to obstruct liberal appointments to the judiciary whilst promoting the nomination of conservative judges who, supposedly, would defend Southern interests through strict adherence to the original meaning in the words of the US Constitution. It should not be assumed that the expression refers to a consistent attack, nor will it be apparent from the research that the state remained on the offensive throughout the period under study.

The second point is that the term 'war' seems appropriate given the significance of the Supreme Court within the broader response of South Carolina to the *Brown* decision. The term seems even more fitting when considering the influence of the man whose actions defined South Carolinian, if not Southern, politics throughout this era. Strom Thurmond's recent biographer, Joseph Crespino, has argued that the aforementioned Southern Manifesto 'initiated for Thurmond a war on the Warren Court that became the most consistent theme of his politics for the next decade and a half.'<sup>57</sup> Although the judicial selection process would eventually accommodate Thurmond's preferences, the Court's liberal majority would remain a threat to the Southern way of life unless diluted by a long-term presidential commitment to the appointment of conservative judges.

Thirdly, it must be understood that the nature of South Carolina's war varied throughout the period under study. For example, the repeated condemnations of the attitude, style and judicial philosophies of the nine Justices suggests that the state's war on the Court was largely rhetorical. This was perhaps most evident in Thurmond's speech before the Citizens Committee for Constitutional Government in Augusta, Georgia in November 1958, when, in one of many condemnations, he declared 'total and unremitting war on the Supreme Court's unconstitutional usurpations and unlawful arrogations of power.'<sup>58</sup> Alternatively, it might be argued that the state's involvement in the politics of the Supreme Court ought not to be referred to as a 'war' following the inauguration in

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<sup>57</sup> Crespino, *Strom Thurmond's America*, p.107.

<sup>58</sup> *Ibid.*, p.109-10.

January 1969 of Richard Nixon, a Republican President elected on the back of a successful 'Southern strategy', who set out to nominate the very brand of conservative judges sought by South Carolina's Senators over so many years. On the other hand, the Senate's rejection in 1969 and 1970 of two Southern Supreme Court nominees (including South Carolina's Clement Haynsworth) ensured that South Carolina's Senators remained at war with Northerners wishing to protect liberal gains made during the 1960s, and claims of an anti-Southern bias suggested that South Carolina would continue to fight for regional, and state, interests in the Senate.

Similar doubts may be voiced when it is remembered that South Carolina's Senators did not wage 'war' on the Supreme Court through a defiant gesture of secession worthy of Vice President John Calhoun's leadership of the state during the drama of the Nullification Crisis, but instead chose to work within the existing system by invoking the senatorial right to 'advice and consent' in the judicial confirmation process. Yet, although the Nixon Presidency marked the beginning of Thurmond's re-invention into a pillar of the Republican Party establishment, the record of Democrat Fritz Hollings in maintaining a consistent streak of independence in his support for conservative nominees ensured that the tradition of South Carolina Democrats defying the national party was continued. Hollings's record in the Supreme Court nomination process from 1970 until his retirement in 2005 does not suggest a continuation of a war on the Supreme Court, but rather a reflection of a lengthy battle to protect the Democratic Party in South Carolina by using a conservative voting record to prevent Republican Party encroachment into the state's conservative white voting bloc. Despite the lack of agreement or co-ordination, and clear evidence of very different political agendas, it remains the case – as this thesis will explain – that a clear solidarity was maintained by the three Senators over the course of each roll call vote.

### **The Three Senators**

The research focuses on the three South Carolina Senators who served during the period under study: Olin Johnston, who served from 1945 to 1965, Strom Thurmond, who served from 1955 to 2003, and Fritz Hollings, who served from 1967 to 2005. Aside from the fact that the period of study in this research encompasses an era in which racial politics played a crucial role in influencing the outcome of some of the most controversial and catastrophic Supreme Court nominations in US history, the other advantage to studying these three pivotal South Carolinian figures is the fact that their lives and careers illustrate several common strands of the state's political culture, but also exhibit many crucial differences.

Strom Thurmond was the last in a long line of controversial South Carolina Senators. His birth on 2<sup>nd</sup> December 1902 in Edgefield County links him to two other notorious figures born in the same county: the aforementioned Congressman Preston Brooks, and the enormously influential Governor Benjamin R. Tillman, who presided over the complete disenfranchisement of black men and called openly for the use of lynching to maintain white supremacy.<sup>59</sup> Thurmond claimed he wished to run for Governor when his father took him to a stump meeting in Edgefield, where the nine-year-old Strom witnessed first-hand the demagogic, race-baiting oratory of Coleman Blease. Thurmond later claimed that he learned from Blease the necessity of aggressive, rousing speeches in winning over cynical Southern crowds.<sup>60</sup> Following a successful legal career, he won the Governorship in 1946. Despite an initially moderate position on race, he did not question the Democratic Party's maintenance of Jim Crow laws established by Tillman in the 1880s. After serving less than two years as Governor, he broke from the Democratic Party in disgust at President Harry S. Truman's civil rights plank during the 1948 presidential campaign and ran for president himself on a Southern Democrat ('Dixiecrat') ticket, winning electoral college majorities in four

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<sup>59</sup> Bass and Poole, *Palmetto State*, p.70-4.

<sup>60</sup> Bass and Thompson, *Strom*, p.25.

Southern states. The campaign ensured Thurmond's credibility as a defender of racial segregation, but marked the beginning of a confrontational relationship with the Democratic Party. He defied the South Carolina Democratic establishment by running successfully as a write-in candidate in the 1954 Senate race, and angered Southern Senators with his filibuster against the 1957 Civil Rights Act.

A fitness fanatic who cultivated a macho persona, Thurmond seized on opportunities to showcase his physical prowess in order to impress his constituents, not always successfully. A *Life* Magazine photograph of him standing on his head was used frequently by political opponents to ridicule him, while the remarkable stamina displayed during his Senate filibuster proved to be in vain when the Civil Rights Act was passed successfully on 9<sup>th</sup> September 1957. Although still a Democrat at the start of 1964, Thurmond had not supported a Democratic presidential candidate in twenty years, and his decision to become a Republican and support Barry Goldwater's effort to reach out to disaffected white Southerners proved to be a landmark event in the South's conversion to the Republican Party.<sup>61</sup> Thurmond retained his huge base of support despite his party defection, and Republican Presidents Richard Nixon and Ronald Reagan found him to be a reliable and influential ally in securing Southern votes.

Although the Southern crusade to maintain segregation was effectively decapitated by passage of the Voting Rights Act of 1965, Thurmond took the leading role in the Southern resistance of President Lyndon Johnson's 1967 nomination of Solicitor General Thurgood Marshall to the Supreme Court, and also Johnson's attempted elevation of Abe Fortas to the Chief Justiceship during the summer of 1968.<sup>62</sup> Thurmond's support for segregationist Albert Watson's unsuccessful 1970 gubernatorial campaign against the liberal John C. West proved to be his final roll of the dice, and, during the 1970s, Thurmond's sense of political pragmatism was evident in efforts to win over newly-enfranchised black voters, even adding his voice to the chorus of approval for the 1982 renewal of the Voting

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<sup>61</sup> Crespino, *Strom Thurmond's America*, p.118.

<sup>62</sup> Murphy, *Fortas*, p.426.

Rights Act. Although he retained an old-fashioned lecherous quality in his dealings with women, Thurmond did attempt to demonstrate a more enlightened approach to race in his later years by hiring black employees and enrolling his daughter at an integrated school, but these token gestures remained overshadowed by the 1948 Dixiecrat campaign, which had already confirmed his place in history.<sup>63</sup> Nonetheless, Thurmond continued to win re-election as a Republican, without black support, until he left the Senate in 2003, aged 100. He died less than a year later.

A fascinating postscript to Thurmond's life was the revelation after his death that, at age 22, he had fathered a mixed-race daughter with his family's 16-year old black maid. Although he maintained contact with his unacknowledged fifth child and supported her financially as a youth, Thurmond concealed her existence to prevent accusations of hypocrisy, and spent years representing disaffected white voters while making a case that his commitment to racial segregation was more authentic than that of his Southern colleagues, including fellow South Carolinian, Olin Johnston. The discovery of a more 'liberal' attitude toward black Americans in Thurmond's personal life was less surprising to those who recalled his womanising, but for others, the emergence of Essie Mae Washington-Williams only added to the continuing fascination with the controversy surrounding Strom Thurmond as an icon of the twentieth century American South.<sup>64</sup>

Olin D. Johnston was destined to become a champion of South Carolina's textile community. Born on 18<sup>th</sup> November 1896 in Anderson County, in the heart of the Piedmont region, he worked as a youth in the Chiquola Manufacturing Company mill and earned his high school diploma at the Textile Industrial Institute. He entered politics while still enrolled at the University of South Carolina, serving in the state's House of Representatives prior to being elected Governor in 1934. His support for Franklin Roosevelt's New Deal produced many progressive policy outcomes including South Carolina's comprehensive rural

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<sup>63</sup> Crespino, *Strom Thurmond's America*, p.285.

<sup>64</sup> See, generally, Bass and Thompson, *Strom*.

electrification programme. His failure to unseat 'Cotton Ed' Smith in a 1938 run at the Senate left him feeling he had not made a sufficient case for the maintenance of racial segregation.<sup>65</sup> He did not make the same mistake in 1944, when his defeat of the ailing Smith was due in no small part to a bold crusade to ensure the total exclusion of African Americans from the South Carolina Democratic Party primary system. In his opposition to the Supreme Court's *Smith v. Allwright* decision, Johnston declared that 'white supremacy will be contained in our primaries – let the chips fall where they may.'<sup>66</sup> In his final year as Governor, he declined to intervene on behalf of the youngest person executed in the state's history, allowing George Stinney, a fourteen-year-old African American boy, to face the electric chair when found guilty of murdering two white girls. In December 2014, the conviction was vacated by Judge Carmen T. Mullen, effectively clearing Stinney's name seventy years after his execution.<sup>67</sup>

In the Senate, Johnston condemned the Supreme Court's *Brown* decision, initiated various measures to curb the power of the Supreme Court, and added his signature to the Southern Manifesto to confirm his commitment to the preservation of racial segregation in his state. Although as Governor he had famously called out the National Guard to occupy the State Highway Division, his senatorial career was largely free from dramatic behaviour, although he caused a stir in 1948 when refusing to attend a racially-integrated Democratic fund-raising dinner so that his wife, Gladys, would be spared the experience of sitting next to a black man.<sup>68</sup> As chair of the Post Office and Civil Service Committee, he earned the nickname 'Mr Civil Service', and remained a reliable Southern vote on the Judiciary Committee against President Dwight D. Eisenhower's supposedly liberal Supreme Court appointments, voting against the confirmations of Earl Warren, John Marshall Harlan and Potter Stewart. While other Southerners clashed with the Democratic Party or bolted it completely, Johnston remained a loyal Democrat

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<sup>65</sup> Simon, *A Fabric of Defeat*, p.216-7; p.230.

<sup>66</sup> Charles L. Zelden, *The Battle for the Black Ballot: Smith v. Allwright and the Defeat of the Texas All-White Primary*. (Lawrence, KS: University Press of Kansas, 2004), p.112; Key, *Southern Politics*, p.627; Farmer, 'Memories and Forebodings', p.246.

<sup>67</sup> 'Judge Vacates Conviction in 1944 Execution', *The New York Times*, 18<sup>th</sup> December 2014, pA28.

<sup>68</sup> Huss, *Senator*, p.158-9.

throughout his life, putting his reluctant support behind the liberal presidential candidate, Senator John F. Kennedy of Massachusetts. Despite their differences on civil rights, Johnston retained a warm friendship with President Lyndon B. Johnson, as evidenced by a telephone call from 26<sup>th</sup> December 1963, when Johnson informed the Senator that, 'I'm an Olin Johnston man. I'll work with you any way I can.'<sup>69</sup>

Until his death from cancer in 1965, Olin Johnston's brand of economically progressive yet racially conservative Democratic politics was appealing to a sufficient number of South Carolinians for him to win re-election over two decades. Although he had made a more aggressive case in support of racial segregation in order to win his Senate seat in 1944, Johnston was able to defend it against more conservative contenders in the Democratic primaries. The most famous example was Strom Thurmond, whose 'Dixiecrat' run for president in 1948 destroyed any hope of him attracting significant black support in his bitter campaign to win Johnston's Senate seat two years later. Despite his conservative position on race, Johnston was able to win a sufficient number of black votes to ensure his re-election: thanks to Thurmond's notorious 'Dixiecrat' reputation, Johnston was even able to win the endorsement of African American civil rights activist Modjeska Simkins during the 1950 Senate campaign.<sup>70</sup> Despite lacking the national profile which Thurmond sought, Olin Johnston remains an influential figure in the history of Southern politics. His enormous contributions to the agricultural and textile industries in South Carolina have been acknowledged by few outside the state, but the lengthy, and successful, campaign to prove George Stinney's execution a miscarriage of justice has ensured the recognition of his racial conservatism on a national scale.

Ernest 'Fritz' Hollings is one of the more complex figures in South Carolina's political history. Born in Charleston on New Year's Day in 1922, he

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<sup>69</sup> Telephone conversation between Lyndon B. Johnson and Olin D. Johnston, 26<sup>th</sup> December 1963, Lyndon B. Johnston Presidential Recordings, Miller Center, University of Virginia, K6312.18.

<sup>70</sup> Wim Roefs, 'The Impact of 1940s Civil Rights Activism on the State's 1960s Scene: A Hypothesis and Historiographical Discussion', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.156-175; p.161; Crespino, *Strom Thurmond's America*, p.92.



aimed for a career in law before being seduced by the glamour of South Carolina politics. Following three terms in the State House of Representatives, he was elected Lieutenant Governor at the age of 32, before reaching the Governor's mansion in January 1959. As Governor, Hollings's main political interest was education. Unlike Olin Johnston, who escalated a dispute with the State Highway Division by calling out the National Guard, Hollings used his charm to the full when making a case for the state's investment in technical training, a previously unheard-of innovation in the state's history. Hollings claims that his views on race were influenced during World War II, when he saw black American soldiers standing outside being given food through a window while white German prisoners of war sat inside at tables.

Hollings secured his gubernatorial election victory by campaigning on a platform of maintaining racial segregation, but once elected, he proved more liberal on civil rights than any of his predecessors. He ensured the safety of demonstrators at lunch counter sit-ins, and allowed the admission of African American student Harvey Gantt to Clemson University, offering his now-famous declaration that a process of desegregation 'must be done with dignity. It must be done with law and order.'<sup>71</sup> Hollings's support for liberal presidential candidate John F. Kennedy damaged his popularity in South Carolina, contributing partly to his failed primary challenge to Olin Johnston in 1962. Nonetheless, through his youth, energy and enthusiasm for business opportunities, he was able to attract a wealth of investment for subsequent Governors to build on. He was once again unequivocal in his support for maintaining segregation in his unsuccessful 1962 primary campaign, and also in his successful 1966 campaign for the Senate following the death of Olin Johnston. Yet, as with his term as Governor, Hollings carved out a moderate path during a thirty-eight-year career in the Senate, remaining a popular Democratic Senator despite the party defection of his South Carolina colleague and a series of Republican challenges to his incumbency during the 1970s, 1980s and 1990s.

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<sup>71</sup> Hollings and Victor, *Making Government Work*, p.82.

His moderate views on race were indicated further by his 1969 'hunger tour', his 1982 vote to renew the Voting Rights Act, and his 1988 endorsement of fellow South Carolinian Jesse Jackson in that year's Presidential Election. Hollings's position on budget-related issues was just as proactive yet more conservative, most notably with his sponsorship of the Gramm-Rudman-Hollings Act of 1985, a collaboration with Senators Phil Gramm of Texas and Warren Rudman of New Hampshire, intended to reduce the national deficit. He maintained a conservative position on judicial appointments, voting against the first ever African American Supreme Court nominee, Thurgood Marshall, in 1967, and supporting the conservative Republican nominations of Robert Bork in 1987 and Clarence Thomas in 1991.

With his dry, self-deprecating wit and heavy Charleston accent, Hollings stood out as a particularly colourful figure during his tenure on the Senate Commerce Committee, during which he questioned Frank Zappa on obscene lyrics in rock music, and cited 'Buffcoat and Beaver' (more commonly known as *Beavis and Butthead*) as an example of the unhealthy influence of television on American families. His passion for fiscal responsibility is discussed extensively in his 2008 memoir, *Making Government Work*, and he has proved to be an outspoken and provocative figure in his early 90s, particularly regarding his views on the Obama Administration's handling of the global economic crisis.

Despite the similarities, there are many differences between the three Senators to illustrate the unique facets of South Carolina politics. Johnston and Hollings represent different sides of the traditional divide between upcountry and lowcountry politics, while Thurmond's birthplace of Edgefield County makes him the last in a long line of controversial South Carolinian politicians.<sup>72</sup> Each of the three Senators under study represents, characterises and defines a different era of twentieth century South Carolina politics: the 'classic' era of Democratic dominance and black disenfranchisement is illustrated by Johnston's continued emphasis on racial segregation; the era of 'massive resistance' is defined by

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<sup>72</sup> Dewey W. Grantham, *The Life and Death of the Solid South: A Political History* (Lexington, KY: University Press of Kentucky, 1988), p.131; Bass and Thompson, *Strom*, pp.3-18.

Thurmond's 1948 presidential run, his leading role in drafting the 'Southern Manifesto' of 1956, and his landmark 1957 filibuster, and the more progressive era referred to as the 'Second Reconstruction' is illustrated by Hollings's farewell address as Governor in 1963, in which he called for the 'dignified' integration of Clemson University.<sup>73</sup> While all three claimed during their gubernatorial and senatorial campaigns to oppose integration, each reflected very different levels of enthusiasm for, and belief in, the principle of racial segregation. Johnston maintained a political stance against segregation as a matter of necessity, while Thurmond's aggressive opposition to integration reflected a more radical stance on the race issue which, although quite consistent with the careers of earlier 'demagogic' South Carolinian figures, did alienate some of Thurmond's Southern colleagues.<sup>74</sup> While Thurmond defected to the Republicans in 1964 to campaign for Barry Goldwater (and later Richard Nixon), both Johnston and Hollings remained loyal to the Democratic Party throughout their careers in the Senate despite misgivings regarding the party's presidential nominees. While Johnston was often unimpressed by some of the more moderate positions on race adopted by the national party over the years, Hollings risked deep unpopularity among South Carolina's voters with his enthusiastic support for John F. Kennedy's successful Presidential Election campaign in 1960.<sup>75</sup>

A comprehensive study of South Carolinian resistance to judicial nominations will benefit enormously from focusing on the Senate careers of Olin Johnston, Strom Thurmond and Fritz Hollings. Their individual and collective influence on the nomination of Supreme Court Justices will contribute to the existing literature on the Supreme Court and provide further insight into the study of race and Southern politics.

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<sup>73</sup> Badger, 'From Defiance', pp.127-143; G. McMillan, 'Integration with Dignity', in E.M. Lander and R.K. Ackerman, (eds.), *Perspectives in South Carolina History: The First 300 Years* (Columbia, SC: University of South Carolina Press, 1973), pp.381-391; Bass and Poole, *Palmetto State*, p.202-4; Bass and Thompson, *Strom*, p.178-9; Crespino, *Strom Thurmond's America*, p.105-7.

<sup>74</sup> Badger, 'From Defiance', p.128; Crespino, *Strom Thurmond's America*, p.102-4, p.110; Bass and Thompson, *Strom*, pp.3-18; p.156.

<sup>75</sup> Grantham, *Life and Death*, p.118; Hollings and Victor, *Making Government Work*, pp.84-110.

## **The Supreme Court Nomination Process**

American Presidents have been selecting individuals to serve on the Supreme Court – the most powerful judicial body in the United States – since 1789. The factors behind the selection of nominees have varied enormously. Some nominees have been chosen due to a personal friendship with the President; others through general agreement on the nominee's suitability for the position; others through recommendations from individuals considered important enough for Presidents to listen to. Some nominees have been selected by Presidents with specific ideological objectives in mind, believing that these objectives can be met through the force of Supreme Court decision-making. Some selections have been made because a President has taken time to gather together different perspectives before making an informed decision, while others have been made as a result of a President's stubborn refusal to listen to others. It is quite common for a President's relationship with the other branches of government to determine a selection: there are many examples of a nominee being chosen because a President was particularly deferential to, or antagonistic towards, the Congress, or to the Supreme Court itself.<sup>76</sup>

While all of these factors may influence the manner in which Presidents select candidates, none is sufficient to explain fully the process of how an individual is nominated and confirmed by the Senate, as there are an infinite number of external factors which have applied to the process since 1789. The one consistent feature of a President's choice of nominee, regardless of all other factors, is the need to have the nominee confirmed by the United States Senate.<sup>77</sup>

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<sup>76</sup> See, generally, Henry J. Abraham, *Justices, Presidents and Senators* (New York, NY: Rowman and Littlefield, 1999). David A. Yalof, *Pursuit of Justices* (Chicago, IL: University of Chicago Press, 1999) offers comparisons of the varying style of judicial selection employed by Presidents Truman through to Clinton. Also, contrast the portrayal of President Herbert Hoover as antagonistic in Peter G. Fish, 'Spite Nominations to the United States Supreme Court: Herbert C. Hoover, Owen J. Roberts and the Politics of Presidential Vengeance in Retrospect', *Kentucky Law Journal* 77 (1988), pp.545-576, with the portrayal of him as deferential to the Senate two years later, in Ira H. Carmen, 'The President, Politics and the Power of Appointment: Hoover's Nomination of Mr Justice Cardozo', *Virginia Law Review* 55, pp.616-59.

<sup>77</sup> Some presidents have made nominations that had little or no chance of being confirmed by the Senate, and, of course, others have made 'spite' nominations under the (usually mistaken) belief that senators would not dare to reject two or

Under the terms of Article II, Section 2 of the United States Constitution, the President of the United States has the power to nominate, and ‘by and with the advice and consent of the Senate’, to appoint Justices of the Supreme Court.<sup>78</sup> The existing literature places a great deal of emphasis on presidential selection, yet offers no consistent explanation regarding who holds the real power in this process. A Senate rejection of a nominee or a withdrawal of a nominee’s name from consideration are both seen as political defeats for a president, and when a vacancy remains unfilled for an extended period of time, leading to a backlog of deadlocked Supreme Court decisions, the political embarrassment for a President is only exacerbated.

Furthermore, a successful confirmation is not always a guarantee of presidential success: many nominees have failed to live up to the expectations of the Presidents who nominated them, and there are some famous examples of Presidents who later regretted their selections, including Harry S. Truman’s 1949 nomination of Tom C. Clark; Dwight D. Eisenhower’s 1953 nomination of Earl Warren and also his 1956 nomination of William Brennan, and George H.W. Bush’s 1990 nomination of David Souter.<sup>79</sup> On the other hand, it has been noted that it takes an enormous amount of time and effort, not to mention some highly complicated considerations of a multitude of competing interests, for Senators to unite in opposition to a president’s nominee.<sup>80</sup> Presidents tend to have a plethora of administrative tools and a large team of dependable staff to push a nomination, but an individual Senator, carrying the burden of proof, will not succeed in

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more nominees consecutively. However, it does not appear that anyone has identified a case in which a President has made a nomination with the intention that the nominee is *not* confirmed.

<sup>78</sup> The full text of the paragraph in question is as follows: ‘He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointments of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments’. Cited in F.G. Cullop, *The Constitution of the United States: an introduction*, (New York, NY: Penguin Group, 1969), p.99.

<sup>79</sup> See Abraham, *Justices, Presidents*; Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York, NY: The Penguin Press, 2007); Yalof, *Pursuit*.

<sup>80</sup> H.P. Monaghan, ‘The Confirmation Process: Law or Politics?’, *Harvard Law Review* 101(6), April 1988, pp.1202-1212.

winning support from other Senators for the rejection of a nominee without superior powers of persuasion and strong emotional issues to pursue.<sup>81</sup>

With these themes in mind – and given the importance of research objective (3) in rejecting the study of nominations as ‘one-off’ events – the thesis will avoid the tendency of the current literature to focus on presidential selection, and will instead highlight the responses of Senators from one particular state. The remarkable lack of Senate rejections during the lengthy period of 1895-1967 does not indicate a nomination process free from controversy. Rather, it invites a closer inspection of the intricacies of all aspects of the process which have been neglected in the existing research, namely, the relationships between Southern Senators on the Judiciary Committee; the relationships of these Senators with their constituents; the question of how the ‘Southern’ agenda with regard to the selection of Supreme Court Justices ultimately influenced judicial politics, and the question of how the Supreme Court’s landmark decisions relating to the race issue may have held particular significance for the state of South Carolina. The struggle of South Carolina’s Senators to influence the nomination process for Supreme Court Justices remains an important yet overlooked chapter in the determination of Southern Senators to impose their regional agenda on a national scale. South Carolina’s role in that story only emphasises the relevance of state, as opposed to ‘regional’, traditions during the most tumultuous period of social and political transformation in twentieth century US race relations.

### **Primary Research**

The research for the thesis was undertaken at a variety of archive collections in the United States. In South Carolina, research was carried out at Clemson University, where the Strom Thurmond and Edgar A. Brown Collections were consulted, and also at the University of South Carolina, in Columbia, where the

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<sup>81</sup> Joel B. Grossman and Stephen L. Wasby, ‘The Senate and Supreme Court Nominations: Some Reflections’, *Duke Law Journal*, 560(3), August 1972, pp.557-591.

collections of Olin D. Johnston, Ernest F. Hollings and Robert E. McNair – located in the South Carolina Political Collections – were examined. In Athens, Georgia, research at the Richard B. Russell Library at the University of Georgia involved research in the Richard B. Russell and Herman Talmadge Collections. At the Dwight D. Eisenhower Presidential Library in Abilene, Kansas, the papers of Attorney General William P. Rogers were examined, while in Washington, DC, the research benefitted from an examination of the Herbert Hoover National Association for the Advancement of Colored People (NAACP) records at the Library of Congress.

The purpose of concentrating the research within these archives was to achieve three essential goals. Firstly, these research materials have assisted in providing insight into the complex political relationships between the three Senators, and also the relationships they would build with their constituents and with the Democratic Party as a whole. This aspect of the research has been essential in analysing the behaviour of these Senators with regard to the Supreme Court nomination process, particularly in relation to the Senate Judiciary Committee. Secondly, the materials have enabled the contextualisation of the thesis within the literature relating to ‘massive resistance’ of civil rights, and therefore help make a lasting contribution to the existing research on race relations in the twentieth century American South. Thirdly, these materials have enabled a contribution of new perspectives to the existing studies of the Supreme Court nomination process by taking the emphasis away from presidential selection and focusing instead on the neglected theme of how Senators shaped the process through complicated relationships, seniority in the US Senate, and political agendas with regard to the race issue.

The research has benefitted enormously from the contributions of Congressman James Clyburn, Assistant Democratic Leader in the US House of Representatives; Jaime Harrison, Chair of the South Carolina Democratic Party; former Congresswoman Elizabeth J. Patterson, daughter of Olin Johnston, and former Congressman John Spratt, all of whom very kindly agreed to be

interviewed. I also received some helpful written correspondence from former Democratic Senator David Gambrell of Georgia, and former Republican Senator Bill Brock of Tennessee. It must be noted with regret that I was unable, despite my best efforts, to secure an interview with Senator Ernest 'Fritz' Hollings. Not having had any direct contact with Senator Hollings, the specific reason for my failure remains somewhat shrouded in mystery despite six months of email correspondence with his personal assistant and a written submission of questions to be asked in the interview.

A comprehensive analysis of secondary sources of research utilised for the thesis is provided in the following chapter, after which the story of South Carolina's war on the Supreme Court is introduced in Chapter Two. That chapter assesses the impact of the *Brown* decision in triggering the escalation of South Carolina's war on the Court, with Olin Johnston using his position on the Senate Judiciary Committee to scrutinise and obstruct the judicial nominations of President Dwight D. Eisenhower – particularly that of Simon Sobeloff to the Fourth Circuit Court of Appeals – and Strom Thurmond achieving a ground-breaking write-in election victory through his frequent condemnation of the unrestricted power of the nine Justices. In Chapters Three and Four, the significance of civil rights hero Thurgood Marshall to the story of South Carolina and the Supreme Court is examined in depth. Chapter Three outlines Johnston's determination to obstruct John F. Kennedy's appointment of Marshall to the Second Circuit Court of Appeals, while Chapter Four analyses Thurmond's very public attempt (following his defection to the Republican Party) to humiliate Marshall during his Supreme Court confirmation hearings. The careful position adopted by the newly-elected Fritz Hollings with regard to the Marshall Supreme Court nomination is covered in depth, and the Hollings enigma is explored further in Chapter Five, the focus of which is Thurmond's explosive, and successful, crusade to prevent the promotion of Justice Abe Fortas to the Chief Justiceship.

Chapter Six analyses the South Carolinian shift from a defensive/obstructionist agenda in the Supreme Court nomination process to a



more pro-active position, with Hollings taking the lead in promoting Richard Nixon's nomination of South Carolinian Judge Clement Haynsworth. Chapter Seven considers the integration of a mellowed Thurmond into the Republican Party establishment while Hollings maintained South Carolina's defiant conservative streak in his complex support for several Republican Supreme Court nominees. The final chapter provides some concluding remarks on the story of South Carolina's war on the Court in the context of a Southern secessionist tendency, focusing largely on the rapid development of the state's two-party system.

## **CHAPTER ONE:**

### **South Carolina and the Supreme Court in the Existing Literature**

*There is a real spark of independence that ignites men once they become immune from all political pressures. As Justices, they sit as neither conservative nor liberal, but as intelligent human beings doing their utmost within their God-given capacities to search for and uphold the truth.<sup>1</sup>*

Barry Goldwater, 1972

Having outlined the rationale for research in the previous chapter, the thesis will now provide a thorough examination of the secondary literature as it applies to the racial politics of South Carolina, and the nomination of Supreme Court Justices. In the process, an overview of each body of literature shall be given, with the key texts highlighted and explained, prior to a conclusion being offered to contextualise the thesis within the existing research. It should be pointed out that one of the defining features of the thesis is the manner in which two separate bodies of literature have been combined. Despite the considerable number of studies focusing on the politics of South Carolina, and an equally bulging literature on the appointment of Supreme Court Justices, there has not yet emerged a single study which analyses the role of South Carolina's politicians in the nomination process. This combination of the two literatures is reflected in research objective (4), through which the thesis brings together the Supreme Court nomination

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<sup>1</sup> Barry Goldwater, 'Political Philosophy and Supreme Court Justices', *American Bar Association Journal* 58 (February 1972), pp.135-140, p.140.

process with the study of Southern political history, which have rarely, if ever, been studied together.

The review has been organised into four sections. In the first section, the existing literature on the nomination process for Supreme Court Justices will be assessed. The second section analyses the current literature as it relates to the history and racial politics of the state of South Carolina, while the third section explores the many existing biographies of Presidents, Senators and Justices as they relate to the themes of the thesis. The final section of the review highlights two sources in particular that have informed and inspired this work.

### **The Supreme Court Nomination Process Literature**

Within the enormous literature relating to the Supreme Court nomination process, scholars have attempted to understand better the manner in which the relationship between the Presidency, the Senate and the Supreme Court – and also the influence of the media and interest groups – has determined the outcome of appointments to the nation’s highest court. Much of the literature has been written in response to the rare yet highly explosive Senate rejections of nominees, offering new perspectives on the supposed ‘politicisation’ of the selection and confirmation process. Perhaps unsurprisingly, much of the literature consists of studies that focus on only one particularly explosive nomination.

The usefulness of studies that seek to analyse the nominations process has been limited somewhat by three patterns within the existing literature. The first is the manner in which many of the best-known studies tend to prioritise methods of presidential selection rather than the regional political interests that have influenced Senators. Abraham (1999) remains the ultimate guide to the Supreme Court nomination process, but the author’s approach of providing a brief account of every nomination in chronological order renders the work a reliable reference point for Supreme Court scholars, rather than a guide to senatorial behaviour over

a lengthy period of time.<sup>2</sup> The fact that the book was originally published in 1974 as *Justices and Presidents*, and re-printed in 1999 as *Justices, Presidents and Senators* (as though the Senators as individuals were something of an afterthought) is perhaps instructive. Other studies, such as Yalof (1999) and Nemacheck (2008), provide greater depth over a shorter period while utilising a similar approach to that of Abraham, and others, such as Greenburg (2007), have applied the focus on Presidents and Justices to explain how recent compositions of the Court have been formed.<sup>3</sup> Yalof's work outlines in detail the methods of selection employed by each President, and his comments on Eisenhower's choices have informed some of the material in this thesis. Studies such as Johnson and Roberts (2004) have analysed the President's role in the process in greater depth, while Perry (1991) has provided a general overview, without studying in depth the manner in which race, religion and gender intersect with one another, or the complex influence of regional politics on the role of Senators with regard to each of these issues.<sup>4</sup>

For scholars seeking to re-evaluate Dwight D. Eisenhower's record on civil rights, it was inevitable that attention would turn to Eisenhower's Supreme Court appointments. Studies such as Kahn (1992), Wermiel (1994) and Nichols (2004) have proved useful for the research, but, as with so many of the other studies considered in this review, the focus of the writer tends to be on the President's role in the process, rather than that of the Senators.<sup>5</sup> While Nichols offers a full and frank discussion of Eisenhower's civil rights record generally, the work of Kahn and Wermiel is focused specifically on Eisenhower's intentions in naming Justices to the Court, with challenges made to two of Eisenhower's (possibly apocryphal)

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<sup>2</sup> Henry J. Abraham, *Justices, Presidents and Senators* (New York, NY: Rowman and Littlefield, 1999).

<sup>3</sup> David Yalof, *Pursuit of Justices* (Chicago, IL: University of Chicago Press, 1999); Christine L. Nemacheck, *Strategic Selection* (Charlottesville, VA: University of Virginia Press, 2008); Jan Crawford Greenburg's *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York, NY: The Penguin Press, 2007).

<sup>4</sup> Timothy R. Johnson and Jason M. Roberts, 'Presidential Capital and the Supreme Court Nomination Process', *The Journal of Politics* 66/3 (2004), pp.663-683; Barbara A. Perry, *A 'Representative' Supreme Court? The Impact of Race, Religion and Gender on Appointments* (London: Greenwood Press, 1991).

<sup>5</sup> Michael A. Kahn, 'Shattering the Myth About President Eisenhower's Supreme Court Appointments', *Presidential Studies Quarterly* 22:1 (1992), pp.47-56; Stephen J. Wermiel, 'The Nomination of Justice Brennan: Eisenhower's Mistake?', *Constitutional Commentary* 11 (1994-5), pp.515-537; David A. Nichols, *A Matter of Justice: Eisenhower and the Civil Rights Revolution* (New York, NY: Simon and Schuster, 2007).

comments, one referring to his nomination of Earl Warren as Chief Justice in 1953 as ‘the biggest damnfool mistake’ he ever made, and another claiming that his two biggest mistakes as President were ‘on the Supreme Court’ – a reference to Warren and also Justice William J. Brennan. These studies offer some insight into the tensions that would build during the 1950s, when South Carolina’s Senators openly opposed Eisenhower’s nominations because they feared precisely what Kahn and Nichols have claimed, namely, that Eisenhower was appointing Supreme Court Justices who would uphold the constitutionality of the *Brown v. Board of Education* decision.

The second pattern that can be identified within the nominations literature is the tendency of some scholars to encourage a perception of Senators as ‘deferential’ to presidential nominations of Supreme Court justices prior to the late 1960s. It is largely the work produced in the 1970s and early 1980s that has established this trend, with examples including Kutner (1974), Songer (1979), Sulfridge (1980) and especially Friedman (1983).<sup>6</sup> While Friedman has attempted to argue that the ‘deferential’ attitude of Senators toward each President was established at the turn of the century, the other three articles discuss the existence of a ‘presumption of confirmation’ within the nomination process. The claim of Sulfridge that such a presumption exists is undermined somewhat by his vague reference to ‘the apparent attitude of the Senate’; his observation that ‘the concession of presidential prerogative appears to exist’, and his conclusion that ‘ideology ... appears to play a significant role’ in the process.<sup>7</sup> Similarly, Kutner has argued that a ‘presumption’ of confirmation for Supreme Court nominees was in place prior to 1968, but the research lacks a coherent or convincing argument to explain how and why this existed, and how and why it eventually broke down. Scholars within this category have not considered the possibility that, even if a presumption of confirmation did exist, the threat of a Senate rejection – or, at the

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<sup>6</sup> Luis Kutner, ‘Advice and Consent: Due Process of the Senate’, *DePaul Law Review* 23 (1974), pp.658-691; Donald Songer, ‘The Relevance of Policy Values for the Confirmation of Supreme Court Nominees’, *Law and Society Review* 13 (1979), pp.927-948; Wayne Sulfridge, ‘Ideology as a Factor in Senate Consideration of Supreme Court Nominations’, *Journal of Politics* 42 (1980), pp.560-67; Richard Friedman, ‘The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond’, *Cardozo Law Review* 5 (1983), pp.1-95.

<sup>7</sup> Sulfridge, ‘Ideology as a Factor’, p.566-7.

very least, the insistence of thorough scrutiny by interested Senators – was present throughout most of the twentieth century.

One reason for the re-occurrence of the ‘presumption of confirmation’ theory is the frequent references to the lengthy period of 1895-1967, during which only one Supreme Court nominee – John J. Parker of North Carolina – was rejected by the Senate, while the period beginning in 1968, which saw the dramatic failure of Abe Fortas’s nomination to the Chief Justiceship, has seen several rejections, withdrawals and fierce confirmation battles. The lack of Senate rejections during the period 1895-1967 would appear on first impression to support the theory of presidential nominees being approved time and time again by ‘deferential’ Senators, but, on the other hand, the statistics can facilitate only a simplistic understanding of the complex process of selecting and confirming an individual for a seat on the Supreme Court. The fact that the confirmation of nominees went virtually uninterrupted over several decades does not take account of the true nature of opposition to any nominee throughout that period, and the lengthy list of confirmations offers no information concerning party control in the Senate, contemporary policy issues, Senate Judiciary Committee personnel, or party fragmentation. Furthermore, the statistics provide no insight into how the Justices have timed their retirements, and no information to provide a true picture of how each nominee’s ethnicity, religion, ideology, or geographical location may have influenced the political conflict over each nomination. The simple fact that Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, William Rehnquist and Clarence Thomas were not rejected by the Senate when nominated to the Supreme Court tells the political historian nothing whatsoever about the controversial confirmation hearings resulting from each man’s selection.

Given the limitations of the mathematical/statistical studies of the Supreme Court nomination process, articles such as Segal and Cover (1989) have had only limited use for this thesis, as have studies in which scholars have taken quantitative research on the Supreme Court nomination process into the realms

of scatter diagrams and mathematical equations.<sup>8</sup> Aside from providing little use for the casual reader, it is difficult to see how studies such as these can achieve anything other than concealing the character of political agendas and also the complexities inherent within the many conflicts which have taken place over nominations. Predictably, it became necessary to prioritise qualitative, rather than quantitative, sources when undertaking research for this thesis. The mathematical/statistical approach remains at odds with this research, given the overwhelming ‘Southern flavour’ of the characters and events involved, and the need to consider the myth of ‘Southern exceptionalism’ in addition to the unpredictable voting patterns of Southern Senators during the period under study. One exception in this sub-category has been provided by Garrett and Rutkus (2009), who have offered a concise and detailed record of all relevant statistics relating to a lengthy period of Supreme Court nominations. Although not an analytical study, this work has proved invaluable in ensuring accuracy in all statistics relating to the relevant dates and roll call votes with regard to each nomination.<sup>9</sup>

Some scholars have been sceptical of the ‘deferential Senators’ theory, not least Laurence Tribe, who, in Chapter Five (‘The Myth of the Spineless Senate’) of his book *God Save This Honorable Court*, argues convincingly that there is ample evidence of Senators applying rigorous scrutiny when considering nominations to the Supreme Court during the period 1895-1967.<sup>10</sup> Tribe’s argument that ‘the Senate has vigorously exercised its power to provide “advice and consent” on presidents’ Court nominations since the time the very first Justices were selected’ is supported overwhelmingly by the research undertaken into the behaviour of South Carolina’s Senators covered in this thesis.<sup>11</sup> Tribe might have added that there is also ample evidence of Presidents spending many hours considering their nominations and discussing them with advisors, and also, as this research will

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<sup>8</sup> Jeffrey Segal and A.D. Cover, ‘Ideological Values and the Votes of Supreme Court Justices’, *American Political Science Review* 83 (1989), pp.557-65.

<sup>9</sup> R. Sam Garrett and Denis Steven Rutkus, who, in *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2009* (published by the Congressional Research Service on 8<sup>th</sup> May 2009).

<sup>10</sup> Laurence Tribe, *God Save This Honorable Court* (New York, NY: Random House, 1985), pp.77-92.

<sup>11</sup> *Ibid.*, p.77.

illustrate, evidence to show that Senators were taking seriously the overwhelming power of the Supreme Court as a political institution long before 1968. For example, Danelski's (1964) lengthy analysis of President Warren G. Harding's nomination of Pierce Butler in 1922 gives an indication of the hours spent by William Howard Taft (as President and, later, as Chief Justice) in selecting nominees for the Supreme Court.<sup>12</sup> In addition to detailing Taft's meticulous approach to ensuring the safe passage of his nominees through the Senate, Danelski offers a comment from Taft on his nomination of Joseph R. Lamar in 1910, which hints at the notion of Southern exceptionalism in the nomination process: 'I only succeeded in securing a man such as I wanted in the South by going down South and staying there for several vacations. This enabled me to know him.'<sup>13</sup> Kutner (1974), despite his references to 'a slight presumption in favour of confirmation' in the politics of judicial nominations, concedes that the presumption 'reduces' in the case of Supreme Court selections, and points out that, prior to Clement Haynsworth, no nominee 'has ever met with a stronger or more determined opposition to his appointment' than Louis Brandeis, who, in 1916, was ultimately confirmed.<sup>14</sup>

Thirdly, scholars of Supreme Court nominations have not yet devoted an entire study to the Southern influence on the process. With a plethora of studies focusing on 'massive resistance' and an equally colossal literature analysing the Supreme Court nomination process, it seems surprising that no scholar has offered a logical combination of the two fields of study, particularly given the overwhelming significance of the *Brown* decision with regard to the consistent Southern influence on the Senate Judiciary Committee from the mid-1950s until the early 1970s. Many scholars have considered the Southern influence as part of their overall analysis, including the aforementioned Abraham (1999) and Comiskey (2004), and also Powe (1975-6) and Thorpe (1969), but no study has yet provided a comprehensive analysis of the Southern attempt to influence the

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<sup>12</sup> David J. Danelski, *A Supreme Court Justice is Appointed* (New York, NY: Random House, 1964).

<sup>13</sup> *Ibid.*, p.81.

<sup>14</sup> Kutner, 'Advice and Consent', p.685.



Supreme Court nomination process, and no scholar appears to have identified the significance of South Carolina in that process during the era of civil rights.<sup>15</sup>

Thorpe (1969) has analysed, in a case-by-case approach, the behaviour of Senators and nominees during the process of confirmation, and, while Strom Thurmond's theatrical style of questioning is discussed, the author, given the purpose of his research, has not pursued the 'South Carolina' angle in the history of the process to reveal the patterns evident within the chapters of this thesis. Perhaps more instructive is Powe's article, which points out the extraordinary nature of the 'point of order' proposed during the tense Senate Judiciary Committee hearings into Potter Stewart's Supreme Court nomination in 1959.<sup>16</sup> As Chapter Two will illustrate in detail, the Stewart hearings are significant for marking the first occasion on which Southern Senators were prepared to discuss the Court's *Brown* decision openly and at length during confirmation hearings.

Much of the Supreme Court nominations literature encompasses research completed in the aftermath of some of the landmark occasions on which the Senate has rejected a nominee. The controversial rejection of President Richard Nixon's nomination of Clement Haynsworth in 1969 prompted increased academic interest in the nomination process, with Grossman and Wasby (1972) offering one example.<sup>17</sup> Perhaps more notable are the studies offered by individuals who were actively engaged in the political process during the deliberations over Haynsworth's nomination, including McConnell (1970-71), whose work is particularly significant given that the text of his article formed the basis of Senator Marlow Cook's 'new standards' speech, which, as will be explained in Chapter Six, summarised the bitterness of Southern Senators over the Haynsworth rejection, attributed by some to an anti-Southern prejudice on the part of Northern Senators.<sup>18</sup> To illustrate both sides of the debate over the

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<sup>15</sup> Michael Comiskey, *Seeking Justices* (Lawrence, KS: University Press of Kansas, 2004); L.A. Scott Powe, 'The Senate and the Court: Questioning a Nominee', *Texas Law Review* 54 (1975-6) pp.891-902; J.A. Thorpe, 'The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee', *Journal of Public Law* 18 (1969), pp.371-402.

<sup>16</sup> Powe, 'The Senate and the Court', p.898.

<sup>17</sup> Joel B. Grossman and Stephen L. Wasby, 'The Senate and Supreme Court Nominations: Some Reflections', *Duke Law Journal* 560(3), (August 1972), pp.557-591.

<sup>18</sup> A. Mitchell McConnell, 'Haynsworth and Carswell: A New Senate Standard of Excellence', *Kentucky Law Journal* 59 (1970-71), pp.7-34.

Senate's 'proper' role in the nominations process, the two Senators from the state of Michigan published articles in *Prospectus* 2 (1968-69), with Republican Robert P. Griffin arguing for 'The Broad Role' and Democrat Philip A. Hart arguing for 'The Discriminating Role'.<sup>19</sup> The Griffin/Hart articles, which are also considered in greater depth in Chapter Six, are highly instructive for highlighting to the scholar of Supreme Court politics a point in history when tensions flared between Senators partly because of conflicting views on the most appropriate method of providing 'advice and consent' on nominations.

A renewed surge of scholarly interest in the nomination process occurred following the 1987 rejection of Robert Bork, resulting in the publication, during the late 1980s and early 1990s, of books and articles focusing on the emergence of an overly 'political' confirmation process, with some studies considering suggestions for reform. Examples include Freund (1988), Carter (1988), Monaghan (1988), Felice and Weisberg (1988-9), Gauch (1989) and Massaro (1990).<sup>20</sup> More studies followed in the wake of Clarence Thomas's explosive confirmation hearings in 1991, among them Reynolds (1991-2), Melone (1991-2), Ruckman (1993), Silverstein (1994), Maltese (1998) and Pickering (2005).<sup>21</sup> Many of these studies have focused on the importance of 'ideology' in the nomination process, yet the manner in which 'ideology' is defined is often questionable. For example, Felice and Weisberg (1988-9) have highlighted the relevance of 'region' as an indicator of Senatorial behaviour in the process, but claim that 'regional differences' as they apply to the South 'are expected to be a function of

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<sup>19</sup> Robert P. Griffin, 'The Broad Role', 2 *Prospectus* (1968-69), pp.285-303; Philip A. Hart, 'The Discriminating Role', 2 *Prospectus* (1968-69), pp.305-310.

<sup>20</sup> Paul A. Freund, 'Appointment of Justices: Some Historical Perspectives', *Harvard Law Review* 101 (1988), pp.1146-1163; Stephen Carter, 'The Confirmation Mess', *Harvard Law Review* 101 (1988), pp.1185-1201; Henry P. Monaghan, 'The Confirmation Process: Law or Politics?', *Harvard Law Review* 101 (1988), pp.1202-1212; John D. Felice and Herbert F. Weisberg, 'The Changing Importance of Ideology, Party, and Region in the Confirmation of Supreme Court Nominees, 1953-1988', *Kentucky Law Journal* 77 (1988-9), pp.509-530; James E. Gauch, 'The Intended Role of the Senate in Supreme Court Appointments', *The University of Chicago Law Review* 65:1 (1989), pp.337-365; John Massaro, *Supremely Political* (Albany, NY: State of New York University Press, 1990).

<sup>21</sup> William Bradford Reynolds, 'The Confirmation Process: Too Much Advice and Too Little Consent', *Judicature* 75:2 (1991-2), pp.80-2; Albert P. Melone, 'The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality', *Judicature* 75:2 (1991-2), pp.68-79; Paul S. Ruckman, 'The Supreme Court, Critical Nominations, and the Senate Confirmation Process', *The Journal of Politics* 55:3 (1983), pp.793-805; Mark Silverstein, *Judicious Choices: The Politics of Supreme Court Appointments* (London: Norton, 1994); John Maltese, *The Selling of Supreme Court Nominees* (Baltimore, MD: Johns Hopkins University Press, 1998); Judge C. Pickering, *Supreme Chaos: The Politics of Judicial Confirmation and the Culture War* (Macon, GA: Stroud and Hall, 2005).

ideology.’<sup>22</sup> As much of the Southern literature, covered in the paragraphs below, suggests, the complexities of Southern politics have accommodated a very diverse range of ideologies within a multitude of factions, throughout many variations on one-party, two-party and ‘no-party’ systems.<sup>23</sup> Olin Johnston’s career provides a useful example: despite maintaining a predictable conservative stand on matters of segregation, Johnston’s support for organised labour regularly put him at odds with his business-friendly Southern colleagues in the Senate, including fellow South Carolinian Strom Thurmond.<sup>24</sup> For this reason alone, studies such as those discussed above have not proved especially helpful to the thesis, although the view of Felice and Weisberg (1988-9) that ‘party affiliation’ was ‘the most powerful predictor’ of voting during the Bork controversy is useful in illustrating the extent to which Southern Democrats had become far more likely to maintain solidarity with others in the Democratic Party by 1987 – at least when it came to Supreme Court nominations – than they had been only fifteen years previously.<sup>25</sup>

Similarly, Silverstein’s (1994) arguments regarding party affiliation have proved to be insightful, not least his references to the ‘minnows’ and ‘whales’ system described in Chapter Five of this thesis. Nonetheless, his view that the ‘politics of deference ... no longer predominates’ because of the decline of the ‘tightly structured, leadership-controlled’ Congress would appear to overlook the rebellious trait of South Carolina’s Senators, which existed long before 1968 and was quite evident in the tensions between Strom Thurmond and Senator Majority Leader Lyndon Johnson in the mid-1950s.<sup>26</sup> Silverstein’s claim that ‘in the highly-structured world of the Senate at mid-century, few Senators would challenge the leadership’ would appear to highlight Thurmond’s significance once again.<sup>27</sup> Furthermore, the correspondence between South Carolina’s Senators and their

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<sup>22</sup> Felice and Weisberg, ‘The Changing Importance of Ideology’, p.514.

<sup>23</sup> See, for example, J. Van Wingen, and D. Valentine, ‘Partisan Politics: A One-and-a-Half, No-Party System’, in James F. Lea, (ed.), *Contemporary Southern Politics* (Baton Rouge, LA: Louisiana State University Press, 1988), pp.124-147.

<sup>24</sup> See Chapter Sixteen (‘Labor Reform’) in John E. Huss, *Senator for the South: A Biography of Olin D. Johnston* (New York, NY: Doubleday, 1961), pp.140-7.

<sup>25</sup> Felice and Weisberg, ‘Changing Importance’, p.523.

<sup>26</sup> Mark Silverstein, ‘The People, The Senate and the Court: The Democratization of the Judicial Confirmation System’, *Constitutional Commentary* 9 (1992), pp.41-58, p.42, p.48; Joseph Crespino, *Strom Thurmond’s America* (New York, NY: Hill and Wang, 2012), p.104.

<sup>27</sup> Silverstein, ‘The People, The Senate’, p.49.

constituents – examined in great detail throughout the thesis – would contradict entirely the claim that ‘for the typical Senator of this era, an appointment, even to the Supreme Court, was rarely critical to the interests of constituents.’<sup>28</sup> As part of research objective (6), through which the thesis argues that the actions of South Carolina’s Senators had an equally powerful effect on the intense politicisation of appointments to the lower courts, Chapters Three and Four will challenge Silverstein’s claim that Senators were unwilling or unable to contest lower court nominations during the era of the Eisenhower Presidency.<sup>29</sup>

The fact that so many studies within the Supreme Court nominations literature are focused on the ‘politicisation’ of the confirmation process since 1968 suggests an on-going fascination among scholars with some of the more dramatic events, many of which have defined the process in more recent years. While even some of the scholars mentioned above, such as Melone (1991-2), have argued that the practice of Senators considering their vote on the basis of a nominee’s ideology ‘did not start with Robert Bork, as has been argued’, it remains the case that a large number of Supreme Court scholars have been attracted to some of the more recent phenomena in the nominations process, including the growing importance of the abortion issue; the increasingly complex influence of interest group involvement; the emergence of Supreme Court nominations as a public spectacle resulting in huge media coverage, and the greater likelihood of Senators supporting or opposing confirmations through maintaining, rather than defying, party solidarity.<sup>30</sup> The Southern influence has certainly been referred to on many occasions, but links have rarely been made between the behaviour of Southern Senators in the nominations process and the complex regional political interests which each of them had to contend with. Also, given the emphasis on the nomination process since 1987, this literature has informed the study of Ernest ‘Fritz’ Hollings’s role in the process, as covered in

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<sup>28</sup> *Ibid.*, p.49.

<sup>29</sup> *Ibid.*, p.31.

<sup>30</sup> Albert P. Melone, ‘The Senate’s Confirmation Role’, p.75.

Chapter Seven, but offers little when studying the nomination process prior to 1968.

Given the scholarly preference for the more controversial nominations, particularly those which resulted in a rare Senate rejection, it is perhaps unsurprising that many studies have considered in depth the Haynsworth and Bork nominations. With Bronner (1989) providing the most comprehensive study of the Bork nomination, the Haynsworth controversy has been examined in depth by Beiser (1969-70), Frank (1991), and the aforementioned McConnell (1970-1).<sup>31</sup> The fascination with Senate rejections has not been limited to the post-1968 period, however, with several books and articles focusing on the one Supreme Court nominee rejected during the period of supposed 'deference', 1895-1967. The John J. Parker rejection of 1930 has been studied by Watson (1963), Mendelsohn (1968), Lisio (1985), Goings (1990) and Kluger (2004-5).<sup>32</sup> One particularly excellent study which makes a direct comparison between the Parker and Haynsworth nominations is Grossman and Wasby (1971), in which the comment regarding 'the relationship of a nomination to the one that proceeded it' proves useful not only for challenging the approach of most scholars in analysing nominations on a 'stand-alone' basis, but also because this observation is directly relevant to the relationship between the Abe Fortas rejection of 1968, covered in Chapter Five, and the Clement Haynsworth rejection of 1969, covered in Chapter Six.<sup>33</sup>

Some studies, such as Massaro (1990) and Johnson and Roberts (2004), consider the manner in which Presidents have 'gone public' in an attempt to rally

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<sup>31</sup> Ethan Bronner, *Battle for Justice* (New York, NY: Sterling, 1989); Edward N. Beiser, 'The Haynsworth Affair Reconsidered: The Significance of Conflicting Perceptions of the Judicial Role', *Vanderbilt Law Review* 23 (1969-70), pp.263-290; John P. Frank, *Clement Haynsworth, the Senate and the Supreme Court* (Charlottesville, VA, and London: University Press of Virginia, 1991); A. Mitchell McConnell, 'Haynsworth and Carswell: A New Senate Standard of Excellence', was published in *Kentucky Law Journal* 59 (1970-71), pp.7-34.

<sup>32</sup> Kenneth W. Goings, *The NAACP Comes Of Age: The Defeat Of Judge John J. Parker* (Bloomington, IN: University of Indiana Press, 1990); Richard Kluger, 'The Story of John Johnston Parker: The First Demonstration of Negro Political Power Since Reconstruction', *The Journal of Blacks in Higher Education* 46 (Winter 2004-5), pp.124-5; Donald J. Lisio, *Hoover, Blacks and Lily-Whites: A Study of Southern Strategies* (Chapel Hill, NC: University of North Carolina Press, 1985); Richard L. Watson, 'The Defeat of Judge Parker: A Study in Pressure Groups and Politics', *Mississippi Valley Historical Review* 50/2 (1963), pp.213-234; Rona H. Mendelsohn, 'Senate Confirmation of Supreme Court Appointments: The Nomination and Rejection of John J. Parker', from *Howard Law Journal* 14 (1968), pp.105-149.

<sup>33</sup> Joel B. Grossman and Stephen L. Wasby, 'Haynsworth and Parker: History Does Live Again', *South Carolina Law Review* 23 (1971), pp.345-359, p.347.

support for a nomination when there appears to be resistance within Congress. But, once again, the focus tends to be on the period from 1968 to the present day. Little attention has been paid to the fact that Olin Johnston's opposition to the Court of Appeals nominations of Simon Sobeloff and Thurgood Marshall prompted both President Eisenhower and President Kennedy to criticise the attempted obstruction and also defend their nominees at press conferences.

Other studies which highlight key events in the history of the nomination process include Fish (1988), whose analysis of the behaviour of President Herbert Hoover in his reaction to the Senate's rejection of John J. Parker is directly comparable to Richard Nixon's far more 'spiteful' nomination of G. Harrold Carswell following the Senate's rejection of Clement Haynsworth, and therefore provides some welcome historical context.<sup>34</sup> Dean (2001) has provided a unique example of a study of one individual who was confirmed twice – once for the position of Associate Justice, and once for the position of Chief Justice – and has proved useful for the attention given to William Rehnquist in this work.<sup>35</sup> Nevertheless, the studies which focus on only one nomination, or only one individual, are of limited use to a scholar wishing to assess the evolution of Senatorial behaviour throughout a long period of time, meaning that most of them, as with the case-by-case approach of Abraham (1999), only re-enforce the perception of each Supreme Court nomination as a 'one-off' event. As explained in the previous chapter, the thesis, through research objective (3), will avoid studying Supreme Court nominations as 'one-off' events and instead offer a more accurate perspective of the selection process, partly through focusing on the long-term consistency of South Carolina's Senators in pursuing their complex political agendas.

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<sup>34</sup> Peter G. Fish, 'Spite Nominations to the United States Supreme Court: Herbert C. Hoover, Owen J. Roberts and the Politics of Presidential Vengeance in Retrospect', *Kentucky Law Journal* 77 (1988), pp.545-576.

<sup>35</sup> John W. Dean, *The Rehnquist Choice* (New York, NY: Touchstone, 2001).

## **The South Carolina Racial Politics Literature**

There exists a wealth of literature on South Carolina's racial politics, most of which falls into three basic categories: firstly, the state's civil rights protest movement; secondly, the behaviour and activities of the state's Democratic Party politicians and, thirdly, the study of 'massive resistance' to the threat of racial integration. Inevitably, there is a significant overlap between the categories. Within the first category, the state's civil rights protest movement has been analysed and discussed in depth, particularly by Lau (2006).<sup>36</sup> James L. Felder (2012), a former activist in the South Carolina National Association for the Advancement of Colored People (NAACP), has analysed the state's civil rights movement region-by-region.<sup>37</sup> Other studies focus on more specific areas of protest, such as Hine (1996), while Grose (2006) has built on these studies by offering a comprehensive guide to the long-overlooked Orangeburg Massacre, and the much-criticised role of Governor Robert E. McNair in presiding over the crisis.<sup>38</sup> Given that all of these studies are concerned primarily with social movements, their use has been limited with regard to the thesis, other than offering valuable contextual information relating to the impact of various Supreme Court decisions, without considering the process for appointing the Justices.

Moore and Burton (2008) have put together an invaluable collection of paper presentations and Q&A sessions which took place at a landmark civil rights conference held at the Citadel in Charleston on 5<sup>th</sup>-8<sup>th</sup> March 2003. The essays within this volume have been successful in detailing many of the overlooked elements of South Carolina's civil rights history, particularly Farmer's article on the

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<sup>36</sup> Peter F. Lau, *Democracy Rising: South Carolina and the Fight for Black Equality Since 1865* (Louisville: University Press of Kentucky, 2006); Winifred B. Moore jr and Orville Vernon Burton (eds.), *Toward the Meeting of the Waters: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina Press, 2008).

<sup>37</sup> James L. Felder, *Civil Rights in South Carolina: From Peaceful Protests to Ground-breaking Rulings* (Charleston, SC: The History Press, 2012).

<sup>38</sup> W.C. Hine, 'Civil Rights and Campus Wrongs: South Carolina State College Students Protest, 1955-1968', *The South Carolina Historical Magazine* (1996), pp.310-331; Philip G. Grose, *South Carolina at the Brink: Robert McNair and the Politics of Civil Rights* (Columbia, SC: University of South Carolina Press, 2006).

state's defiance of the Supreme Court's *Smith v. Allwright* decision, and the study of the landmark *Briggs v. Elliott* case offered by Burton, Burton and Appleford.<sup>39</sup> As a comprehensive guide to the civil rights history of South Carolina, this volume is probably the most effective offering within this category of the literature. Most importantly, it brings together the key themes of the existing scholarship relating to South Carolina's racial politics in the twentieth century, namely, the state's history of lynching (particularly the Willie Earle case); the rise of 'massive resistance' and the white Citizens' Councils; black activism and protest; the legacies of the state's important Governors, and the story of desegregation in the state's educational institutions, notably Clemson University. This suggests an exciting possibility that the thesis offers a new theme in the scholarship, in the sense that none of the studies within this volume appear to address the behaviour of South Carolina's Senators in the Senate itself, and, while Farmer notes the influence of the state's political culture on the defiant behaviour of South Carolina's leaders, the attitude of those leaders toward the Supreme Court has not been analysed in depth.<sup>40</sup>

Badger (2007) has offered a detailed overview of the state's adjustment to racial integration during the 1960s and early 1970s.<sup>41</sup> Originally presented by the author at the aforementioned Citadel conference, while sharing the stage with former Governors Fritz Hollings and John C. West, the article provides a useful example of the manner in which the state has been neglected in the existing literature. Declaring at the outset that 'I am not a historian of South Carolina', Badger proceeds to compare what he refers to as the 'self-exculpatory' model of 1950s resistance to integration (in which everyone except the state's politicians are blamed for 'massive resistance') and the 'self-congratulatory' model (in which

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<sup>39</sup> James O. Farmer, 'Memories and Forebodings: The Fight to Preserve the White Democratic Primary in South Carolina', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.243-251; Orville Vernon Burton et al., 'Seeds in Unlikely Soil: The *Briggs v. Elliott* School Desegregation Case', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina in the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.176-200.

<sup>40</sup> Farmer, 'Memories and Forebodings', p.249.

<sup>41</sup> Anthony J. Badger, 'From Defiance to Moderation: South Carolina Governors and Racial Change', Anthony J. Badger (ed.), *New Deal/New South: an Anthony J. Badger Reader*, (Fayetteville, AR: University of Arkansas Press, 2007), pp.127-143.



the state's responsible leaders take the credit for overseeing South Carolina's acceptance of integration during the 1960s).<sup>42</sup>

Although Badger remains one of the more distinguished scholars of Southern political history – and 'From Defiance' has proved to be very useful for the thesis – his published output suggests that South Carolina is not one of the author's passions. In 'Whatever Happened to Roosevelt's New Generation of Southerners?', he looks at the emergence of a new wave of Southern Senators during the 1930s, who were allied with Franklin Roosevelt and supportive of early New Deal measures, but who ultimately pursued a conservative line on the race issue in the Senate. One of Roosevelt's closest Southern allies, throughout the New Deal and beyond, was South Carolina's James F. Byrnes, but Byrnes is not mentioned in the article, despite being discussed at length in 'From Defiance'. Furthermore, there is no mention in the 'New Generation of Southerners' chapter of Olin Johnston, even though Badger mentions Roosevelt's attempted 'purge' of conservative southerners in 1938, a ploy which involved the President's backing of Johnston to replace Senator 'Cotton Ed' Smith.<sup>43</sup> Naturally, in 'Southerners Who Refused to Sign the Southern Manifesto', Badger is more concerned with the few Southern politicians who qualified for the label offered in the title, rather than the murky world of the many others who did sign the manifesto but with great reluctance – a fate which might have applied to Senators and Congressmen from South Carolina.<sup>44</sup>

The transition of South Carolina into an acceptance of desegregation, as symbolised by Harvey Gantt's enrolment at Clemson University, is a much-discussed topic within the literature, as demonstrated by McMillan (1973), and, more recently, Mickey (2015).<sup>45</sup> Most of these works, and some others, including Black (1976), focus on Governors, rather than Senators, thus allowing useful

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<sup>42</sup> *Ibid.*, p.129.

<sup>43</sup> Anthony J. Badger, 'Whatever Happened to Roosevelt's New Generation of Southerners?', in Anthony J. Badger, *New Deal/New South: an Anthony J. Badger Reader* (Louisville: University of Arkansas Press, 2007), pp.58-71; p.63.

<sup>44</sup> Anthony J. Badger, 'Southerners Who Refused to Sign the Southern Manifesto', *The Historical Journal* 42/2 (1999), pp.517-534.

<sup>45</sup> George McMillan, 'Integration with Dignity', in Ernest M. Lander and R.K. Ackerman (eds.), *Perspectives in South Carolina History: The First 300 Years*, (Columbia, SC: University of South Carolina Press, 1973), pp.381-391; Robert Mickey *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015).

contextual knowledge but ultimately rendering them little use in a study of Southern senatorial behaviour in the nomination process for Supreme Court Justices.<sup>46</sup> While Mickey (2015) considers the breakdown of ‘authoritarian enclaves’ within three Deep South states throughout a time period which coincides neatly with that adopted for the thesis (devoting several large sections to the state of South Carolina), the work is concerned primarily with competing political factions, rather than the relationship between one state and one particular political institution at the federal level. It does, on the other hand, provide an excellent analysis of the political enclave that controlled South Carolina during this period, allowing opportunities for reflection on the influence of the state’s political culture and dominant ideology, which build usefully on Simon’s (2000) analysis of South Carolina’s system of malapportioned representation in the General Assembly.

The significance of Republican Party growth in South Carolina during the 1960s has been covered admirably in two excellent articles from Hathorn (1988) and Merritt (1997).<sup>47</sup> Despite the fact that neither study focuses on the Supreme Court nomination process, both articles have provided invaluable contextual information in the assessment of Olin Johnston’s behaviour in the nomination of Thurgood Marshall to the Second Circuit Court of Appeals, and also the significance of Strom Thurmond’s defection to the Republican Party during a period in which moderate Democratic Governors were steering South Carolina through a complex process of desegregation. Hathorn’s observation that ‘[Congressman Albert] Watson’s defeat seemed to convince Southern candidates after 1970 that they could not realistically challenge or undermine the nation’s acceptance and growing commitment to civil rights’ provides a useful historical signpost for the thesis, marking a period in which the Southern conservative forces on the Senate Judiciary Committee – motivated for years by fury at the

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<sup>46</sup> Earl Black, *Southern Governors and Civil Rights* (Cambridge, MA: Harvard University Press, 1976).

<sup>47</sup> Billy B. Hathorn, ‘The Changing Politics of Race: Congressman Albert William Watson and the SC Republican Party, 1965-1970’, *The South Carolina Historical Magazine* (1988), pp.227-241; Russell Merritt, ‘The Senatorial Election of 1962 and the Rise of Two-Party Politics in South Carolina’, *The South Carolina Historical Magazine* (1997), pp.281-301.

*Brown* decision – were finally beginning to decline.<sup>48</sup> Although not dealing with the nomination process, Frederickson (1997) has highlighted the manner in which South Carolina's brutal regime of segregation proved significant enough to influence President Harry S. Truman's decision to set up the Committee on Civil Rights.<sup>49</sup>

Despite the best efforts of this writer to avoid the predictable habit of most Southern political scholars in eulogising V.O. Key's seminal *Southern Politics in State and Nation* (1949), it must be acknowledged that Key's chapter on South Carolina remains, after a staggering sixty-six years, by far the most useful and readable guide to the state's political tradition.<sup>50</sup> Key's account of Olin Johnston's defiance of the Supreme Court's *Smith v. Allwright* decision in 1944, located in a later chapter in the same book, has also proved remarkably useful to this thesis. It is instructive that no subsequent scholar has succeeded in improving upon Key's work with regard to the political history of this particular state. His view, outlined in his chapter on South Carolina, that 'the race problem in exaggerated form adds a weapon that can be used at times to destroy all semblance of a rational politics' might have made for an equally inspiring opening quote for this chapter.<sup>51</sup>

Frank E. Jordan's well-regarded study, *The Primary State: A History of the Democratic Party in South Carolina, 1896-1962* offers a punctilious account of South Carolina's Democratic primary elections, and has been extremely valuable in providing the necessary dates, figures and other information for accurate reporting of all relevant contests throughout the period under study. The book is difficult to find, and I am indebted to Jaime Harrison, the Chairman of the South Carolina Democratic Party, for lending me his battered but perfectly readable copy. Historical perspective on South Carolina's racial politics has been facilitated by the legendary W.J. Cash, whose mammoth 1941 study, *The Mind of the South*, remains essential reading for Southern historians, while further insight into the

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<sup>48</sup> Hathorn, 'The Changing Politics of Race', p.241.

<sup>49</sup> Kari Frederickson, "'The Slowest State' and 'Most Backward Community': Racial Violence in South Carolina and Federal Civil Rights Legislation, 1946-48", *The South Carolina Historical Magazine* (1997), pp.177-202.

<sup>50</sup> V.O. Key, *Southern Politics in State and Nation* (New York, NY: Vintage, 1949).

<sup>51</sup> *Ibid.*, p.142.

era of Governors Benjamin Tillman and Coleman L. Blease has been offered by more recent studies, notably, Simkins (1964) and Simon (1996).<sup>52</sup> Although Edgar's (1998) treatment of the civil rights era is no more thorough than the study offered by Bass and Poole (2007), his enormous and brilliant account of the complete history of South Carolina prior to *Brown* has allowed much insight into the significance of the 'peculiar institution' of slavery – particularly with regard to the unique influence of the slave system used in Barbados, which was exported to South Carolina – and also the incredible legacy of the Nullification Crisis of the 1830s, which, as will be argued in the thesis, has informed to some extent the course of events in the story of South Carolina and the Supreme Court.<sup>53</sup>

Other, more philosophical studies, notably, Rogers (2000), offer reflections on the psychology of South Carolinians, which may have informed the overall analysis of the state's racial politics.<sup>54</sup> Some studies have been helpful in considering South Carolina's political history and tradition: the aforementioned Mickey (2015) has suggested that the state's deeply conservative political culture created a hugely successful slave economy, giving South Carolina a degree of wealth which 'amplified South Carolina's voice in national politics ... and later developed the doctrine of nullification.'<sup>55</sup> This analysis has provided a generous measure of context for some of the sensational episodes of rebellion in the state's history that would occur during the twentieth century.

A variety of studies, including Wilhoit (1973), and, more recently, Bartley (1999), Webb (2005) and Lewis (2006), have analysed the phenomenon of white resistance movements.<sup>56</sup> Each of these studies focuses on the activities of conservative organisations such as the white Citizens' Councils and the Ku Klux Klan and each tends to focus on community organisation, public protests and

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<sup>52</sup> Francis Butler Simkins, *The Tillman Movement in South Carolina* (Gloucester, MA: Peter Smith, 1964); Bryant Simon, 'The Appeal of Cole Blease of South Carolina: Race, Class and Sex in the New South', *The Journal of Southern History* 62:1 (1996), pp.57-86.

<sup>53</sup> Walter Edgar, *South Carolina* (Columbia, SC: University of South Carolina Press, 1998).

<sup>54</sup> George C. Rogers, 'Who is a South Carolinian?', *The South Carolina Historical Magazine* (2000) pp.319-329.

<sup>55</sup> Robert Mickey, *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015), p.65.

<sup>56</sup> Francis M. Wilhoit, *The Politics of Massive Resistance* (New York, NY: George Braziller, 1973); Numan V. Bartley's *The Rise of Massive Resistance: Race and Politics in the South During the 1950s* (Baton Rouge, LA: Louisiana State University Press, 1999); Clive Webb (ed.), *Massive Resistance: Southern Opposition to the Second Reconstruction* (Oxford: Oxford University Press, 2005); George Lewis, *Massive Resistance: The White Response to the Civil Rights Movement* (London: Bloomsbury Academic, 2006).

political violence. Despite the voluminous literature on this topic, few if any of these scholars appear to have made the suggestion that the war of Southern Senators on the Supreme Court ought to be considered an integral part of the 'massive resistance' concept. Despite the limited use of these studies to this particular thesis, the current batch of available research on 'massive resistance' does provide a useful indication of the gap in the existing literature regarding the behaviour of Southern Senators with regard to Supreme Court appointments following the announcement of the *Brown* decision.

The absence of the nomination process in the existing 'massive resistance' literature is perhaps explained by the fact that the writers have emphasised the relevance of protests and confrontations rather than the less thrilling but equally significant institutional procedures of the US Senate. Another explanation for the limited use of this category of literature is the fact that the transformation of South Carolina's racial politics during the period under study does not conform strictly to the massive resistance narrative present in the histories of other Southern states: Congressman James Clyburn has argued that massive resistance did not take place in South Carolina, while Robert Mickey has argued persuasively that the state's acceptance of peaceful integration was 'harnessed' by the careful political co-ordination of influential South Carolinian politicians, notably, Fritz Hollings.<sup>57</sup> While the nature of South Carolina's 'massive resistance' may be contested, the thesis will argue, through research objective (1), that the state has played the most important (yet overlooked) role in the development of Supreme Court nomination hearings into political, and confrontational, public events.

Of the many studies that examine the *Brown* decision itself, and the political consequences for the nation, Patterson (2002) remains perhaps the most comprehensive of the relatively recent studies.<sup>58</sup> A Southern legal perspective is provided by at least two rather unique works, namely, Peltason (1971) and Wilkinson (1979), which have allowed some insight into the influence of Judges

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<sup>57</sup> Interview with James Clyburn, 3<sup>rd</sup> October 2014; Mickey, *Paths*, p.6-7.

<sup>58</sup> James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy* (Oxford: Oxford University Press, 2002).

from the Fourth Circuit Court of Appeals, which included the state of South Carolina.<sup>59</sup> Other studies, such as Klarman (2004), mentioned in the previous chapter, appear to highlight the significance of Dwight Eisenhower's appointment of Earl Warren as Chief Justice, yet, notably, the significance of the selection and confirmation process which resulted in Warren taking his seat has not been considered.<sup>60</sup>

Although much of the vast literature on the overwhelming significance of the *Brown* decision considers the controversy of an 'activist' Supreme Court making highly political decisions which struck at the heart of race relations in the Southern states, it does seem remarkable that so few of these studies appear to make the logical connection between white resistance to judicial decisions on school desegregation and the selection of the Justices who made such decisions. Klarman (2004) argues that the nomination of Earl Warren as Chief Justice was the key event which shifted the nine Justices from a 5-4 decision against desegregation in 1952 to a unanimous decision supporting desegregation in 1954. If it is truly the case that Warren's appointment had such a dramatic impact on the course of American history, it is notable that Klarman spends virtually no time considering the politics of Warren's appointment. While other studies comment on the highly controversial nature of Warren's reputation in the South (where his impeachment was regularly endorsed), few studies appear to consider the manner in which the Warren appointment might have motivated Southern Senators to apply greater scrutiny to future Eisenhower nominees, despite the fact that the aforementioned Powe (1976) has cited the 'point of order' raised during the Potter Stewart hearings of 1959, by which time Olin Johnston was a senior Judiciary Committee member, as a 'watershed' moment in Senate hearings of presidential nominations to the Supreme Court.<sup>61</sup>

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<sup>59</sup> J. Harvie Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (Oxford: Oxford University Press, 1979); J.W. Peltason, *58 Lonely Men: Southern Federal Judges and School Desegregation* (Chicago, IL: University of Illinois Press, 1971).

<sup>60</sup> Michael J. Klarman, *From Jim Crow to Civil Rights* (Oxford: Oxford University Press, 2004).

<sup>61</sup> Powe, 'The Senate', p.898.

The thesis has benefitted from studying various texts which have influenced countless scholars of the South, becoming ‘staples’ of the region’s political history, including Woodward (1974), Tindall (1975), Bartley and Graham (1975), Grantham (1988), Black and Black (1989), Rae (1994), Bass and DeVries (1995), Bartley (1996), and more recent works, including Pascoe et al (2005) and Cobb (2012).<sup>62</sup> All of these studies have discussed briefly the racial politics of South Carolina but focus on the Southern region as a whole. Nonetheless, these sources have provided much in the way of contextual information: Tindall’s (1975) comments on ‘populism’ have contributed in no small part to an informed understanding of the Southern political tradition, while Rae’s (1994) comments on the significance of Fritz Hollings in his study of Southern Democratic political identity have been useful in the study of Hollings’s contribution to the history of Supreme Court nominations offered in Chapter Seven.

### **Biographies of Senators, Presidents and Justices**

Given the rather obvious fact that a biography tends to focus on one particular subject, it was never likely that this category of the literature would prove especially useful in studying the Supreme Court nomination process over a twenty-year period. It was necessary, however, to investigate the existing biographical material relating to the South Carolina Senators, if only to establish the political context within which each of them attempted to influence Supreme Court nominations.

Of the three Senators under study in this thesis, only Strom Thurmond has

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<sup>62</sup> Numan V. Bartley, *The New South, 1945-1980* (Baton Rouge, LA: Louisiana State University Press, 1996); C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford: Oxford University Press, 1974); George Brown Tindall, *The Persistent Tradition in New South Politics* (Baton Rouge, LA: Louisiana State University Press, 1975); Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction* (Baltimore: Johns Hopkins University Press, 1975); Jack Bass and Walter DeVries, *The Transformation of Southern Politics* (Athens, GA: University of Georgia, 1995); Earl Black and Merle Black, *Politics and Society in the South* (Cambridge, MA: Harvard University Press, 1989); Nicol C. Rae, *Southern Democrats* (Oxford: Oxford University Press, 1994); Dewey W. Grantham, *The Life and Death of the Solid South: A Political History* (Lexington, KY: University Press of Kentucky, 1988); Craig S. Pascoe et al (eds.), *The American South During the Twentieth Century* (Athens, GA: University of Georgia Press, 2005); James C. Cobb, *The South and America Since World War II* (Oxford: Oxford University Press, 2012).

been the subject of high-quality political biographies. Cohodas (1995) and Crespino (2012) have provided excellent studies which analyse Thurmond's highly significant role in Southern politics, and his enormous contribution to the modern US conservative movement.<sup>63</sup> Although less impressive as a political biography, Bass and Thompson (2005) have offered one of the most thorough examinations of the life of Thurmond's mixed-race daughter, Essie Mae Washington-Williams, whose existence remained secret until after the Senator's death.<sup>64</sup> The use of the Crespino biography in providing a fresh, modern perspective on the Thurmond legend is evident in the author's discussion of the infamous speech in which Thurmond declared, during his 1948 'Dixiecrat' run for President, that 'there's not enough troops in the army to force the Southern people to break down segregation and admit the Negro race into our theatres, into our swimming pools, into our homes and into our churches.' Crespino claims that Thurmond said neither 'Negro' nor 'Nigra', and that he did in fact use a more offensive term beginning with 'n', knowing that 'this throng of angry white men was testing him, and he was determined not to fall short.'<sup>65</sup> National newspapers substituted the word 'Negro' for what was actually said, leading biographers and historians – unwittingly – to produce inaccurate versions of this notorious speech. Indeed, both Mann (1996), who is discussed below, and Badger (2007) have used the 'Negro' version. The audio recording of the speech, used in Stefan Forbes's brilliant 2008 documentary, *Boogie Man: The Lee Atwater Story*, proves that Crespino is correct, and that Thurmond did in fact refer to 'the n\*\*\*\*\* race'.<sup>66</sup> Crespino's discussion of this historical oversight is notable for his valuable observation that 'the better class of white folks' avoided the term 'n\*\*\*\*\*' in order to distinguish themselves from 'those sorrier, lower class whites whose hatred of blacks was understood to derive from their own insecure place in the

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<sup>63</sup> Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (Macon, GA: Mercer University Press, 1995); Joseph Crespino, *Strom Thurmond's America* (New York, NY: Hill and Wang, 2012).

<sup>64</sup> Jack Bass and Marilyn W. Thompson, *Strom: The Complicated Personal and Political Life of Strom Thurmond* (New York, NY: Public Affairs, 2005).

<sup>65</sup> Crespino, *Strom Thurmond's America*, p.72.

<sup>66</sup> *Ibid.*, p.71.



pecking order.<sup>67</sup> This distinction is evident in Thurmond's personal correspondence, in which the term was used occasionally in letters from some of his constituents.

Fritz Hollings has, with Kirk Victor, produced his memoirs in the form of *Making Government Work* (2008), which has preserved his career as he wishes it to be remembered.<sup>68</sup> As a former segregationist politician who was able to carve out a moderate path during the South's acceptance of desegregation, Hollings has been selective in telling the story of his political life, and devoted much of this work to his arguments regarding the effectiveness of the Federal Government, particularly on the issue of fiscal responsibility. Despite this focus, Hollings's memoir does offer insight into his views on the Supreme Court, with an entire chapter devoted to the Clement Haynsworth rejection, and another chapter – entitled 'The Supreme Court Corrupts Congress' – making clear his disgust at the Court for striking down provisions of the Federal Election Campaign Act of 1974. In this regard, the book has been valuable to the study of Hollings offered in Chapter Seven, but less so in the case of his decision to oppose Thurgood Marshall's Supreme Court nomination, covered in Chapter Four, and also Abe Fortas's confirmation as Chief Justice, covered in Chapter Five.

The one Olin Johnston biography in existence was published during the Senator's lifetime, in 1961, and was written by his pastor, John E. Huss. With *Senator for the South: A Biography of Olin D. Johnston*, Huss has managed to create a remarkably dull account of the life of an otherwise fascinating Southern politician.<sup>69</sup> Despite his good intentions, the pastor has undermined the quality of his research with the overwhelming admiration he expresses for his subject, and his defence of Johnston's stand on every issue, including segregation, eventually becomes distracting. A typical example is Huss's conclusion that 'nineteen hundred and forty-eight was a year in which Johnston courageously maintained loyalty both to his principles and to his party. His opposition to President Truman

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<sup>67</sup> *Ibid.*, p.72.

<sup>68</sup> Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008).

<sup>69</sup> John Huss, *Senator for the South: A Biography of Olin D. Johnston* (New York, NY: Doubleday, 1961).

did not stem from personal animus but was sincerely a matter of principle.’<sup>70</sup>

While Thurmond’s biographers have been compelled to discuss their subject’s confrontational approach in the nomination process for Supreme Court Justices – particularly as it related to his views on segregation, obscenity and crime and punishment – none of these writers has accommodated an in-depth consideration of each man’s role in a long-term campaign of obstruction with regard to the Supreme Court.

While the current literature on South Carolina’s politics is sorely missing comprehensive biographies of both Johnston and Hollings, both men have featured prominently in studies of the state’s textile industry, including Simon (1998) and Minchin (2008).<sup>71</sup> No study has yet emerged to provide an in-depth account of either man’s lengthy career in the US Senate, and so research on their behaviour in the Supreme Court nomination process is still lacking in the existing literature. Arguably the finest biographical work of a South Carolinian political figure is Robertson’s (1994) study of James F. Byrnes, which remains essential reading for any scholar of South Carolina’s politics during the period under study in this thesis.<sup>72</sup> Although Byrnes is not one of the three Senators being studied, his long-term influence on the state’s politics proved to be colossal, and, as the following chapters will illustrate, his presence permeates the early stages of the story under examination.

Despite the overwhelming emphasis on presidential selection of Supreme Court nominees, rather than senatorial ‘advice and consent’, it remains the case that many of the presidential biographies provide little insight into the Supreme Court nomination process. On the other hand, scholars of the Presidency tend not to examine the nomination of Supreme Court Justices without an obvious example of a spectacular occurrence in the process of confirmation. Robert Dallek’s (2003; 2004) biographical works on Presidents Kennedy and Johnson

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<sup>70</sup> *Ibid.*, p.165.

<sup>71</sup> Tim Minchin, ‘An Uphill Fight: Ernest F. Hollings and the Struggle to Protect the South Carolina Textile Industry, 1959-2005’, *The South Carolina Historical Magazine* 109:3 (2008), pp.187-211; Bryant Simon, *A Fabric of Defeat: The Politics of South Carolina Millhands, 1910-1948* (Chapel Hill, NC: University of North Carolina Press, 1998).

<sup>72</sup> David Robertson, *Sly and Able: A Political Biography of James F. Byrnes* (New York, NY: W.W. Norton and Co, 1994).

provide typical examples: while *John F. Kennedy: An Unfinished Life, 1917-1963* contains no reference whatsoever to Kennedy's nominations of Byron White and Arthur J. Goldberg, Dallek's study of Lyndon Johnson, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973*, offers only the briefest account of Johnson's nomination of Abe Fortas, who became the subject of one of the most spectacular confirmation battles in US history.<sup>73</sup> Studies focusing on Presidents will elaborate on the Supreme Court nomination process only when offering a more focused study, as in the case of Nichols (2007), who re-considers Dwight Eisenhower's record on civil rights and includes some consideration of the influence of Southern Senators on his judicial nominations. His claim that Eisenhower selected judges who would uphold the constitutionality of the *Brown* decision is not unique, but it does serve as an interesting starting point for a comprehensive consideration of the Southern anti-*Brown* influence on the Senate Judiciary Committee.

One possible exception to the trend of presidential biographers largely overlooking the nomination process may yet be supplied by Robert J. Caro, who is currently working on the fifth volume of his exhaustive and much-celebrated biography of Lyndon Johnson, which has been published in stages since 1982. In the meantime, McFeeley (1987) has discussed the much-overlooked importance of lower court nominations in a study which has assisted in highlighting elements of Chapter Five concerning the argument of research objective (6) that South Carolina has contributed enormously to the intensification and politicisation of Court of Appeals nominations.<sup>74</sup>

The current literature includes some excellent biographical studies of Supreme Court Justices, of which Newman's (1994) exceedingly thorough study of Hugo Black is surely among the best and most enduring.<sup>75</sup> Abe Fortas has been the subject of two excellent studies, namely Murphy (1988) and Kalman (1992).<sup>76</sup> In a remarkable study that covers several chapters, Murphy has provided the

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<sup>73</sup> Robert Dallek, *John F. Kennedy: An Unfinished Life, 1917-1963* (London: Allen Lane, 2003); Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973* (Oxford: Oxford University Press, 1998).

<sup>74</sup> Neil D. McFeeley, *Appointment of Judges: The Johnson Presidency* (Austin, TX: University of Texas Press, 1987).

<sup>75</sup> Roger K. Newman, *Hugo Black: a Biography* (New York, NY: Pantheon, 1994).

<sup>76</sup> Laura Kalman, *Abe Fortas: a Biography* (New Haven, CT: Yale University Press, 1992); Bruce Allen Murphy, *Fortas* (New York, NY: William Morrow and Co, Inc, 1988).

definitive account of the controversial Fortas confirmation hearings, making this section of his biography an essential read for any serious scholar of the Supreme Court nomination process. The strength of Murphy's study lies in the fact that he has illustrated the extraordinarily complex mass of events, processes and relationships that determine the final outcome of a controversial Supreme Court nomination. By focusing on the President, the nominee, the Senators and outside influences, Murphy has excelled where so many studies of Supreme Court nominations have not succeeded, simply in the sense that he has not neglected any of the relevant aspects of the process. However, as detailed and impressive as his work is, Murphy's contribution only emphasises the fact that biographies of Justices provide only a snapshot of the nomination process as it functioned when the biographer's subject was nominated. In other words, the biographies of the Justices only maintain the current pattern of assessing each Supreme Court nomination in isolation.

Newton (2007) has offered a well-written account of Chief Justice Warren's leadership of the Supreme Court during the civil rights era, which has been useful to the research, given that Warren's influence is a consistent theme to which the thesis returns regularly.<sup>77</sup> Thurgood Marshall has been the subject of several studies, including Tushnet (1997) and also Williams (1988), who has provided detailed accounts of Johnston's opposition to Marshall's Second Circuit Court of Appeals nomination, and, later, Thurmond's opposition to Marshall's Supreme Court nomination.<sup>78</sup> However, Williams's focus is, of course, his subject, and so, despite his extensive account of Marshall's trip to South Carolina to argue the *Briggs v. Elliott* case, which has influenced much of the material in Chapter Three, he has not pursued the 'South Carolina' angle in the story of Thurgood Marshall's judicial appointments.

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<sup>77</sup> Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York, NY: Riverhead, 2007).

<sup>78</sup> Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991* (Oxford: Oxford University Press, 1997); Juan Williams, *Thurgood Marshall: American Revolutionary* (New York, NY: Random House, 1988).

## Sources of Inspiration

In addition to the work of Key (1949) and Tribe (1985) considered above, there are two other sources that, while not immediately relevant in terms of their focus, have influenced (or perhaps inspired) this research. *The Brethren* (1979), the legendary study of the Supreme Court written by Bob Woodward and Scott Armstrong, and Robert Mann's *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights* (1996) have established a particular tradition of US political history which this research is inclined to follow. One reason is that Mann, Woodward and Armstrong have backgrounds in journalism, thus freeing them from the conventional academic approach that characterises most of the existing literature, with a sophisticated and readable style which encourages the reader to turn the page. As with Bruce Allen Murphy's study of the Fortas nomination, Mann has not neglected any of the relevant institutional aspects of the story he wishes to tell, while Woodward and Armstrong have rejected the clichés of most Supreme Court studies and focused instead on the political realities of how the Justices reach a decision on each case.

The remarkably frank and personal insights within *The Brethren*, achieved through hours of interviews, have allowed greater insight into the minds of the Justices than studies which offer hundreds of pages focusing on judicial interpretation.<sup>79</sup> By avoiding a dry analysis of constitutional interpretation, *The Brethren* offers perhaps a more stark demonstration of the Court's raw judicial power than a study such as McKeever (1995), which offers much in the way of constitutional interpretation but little to explain the political context of each Justice's background and approach.<sup>80</sup> While scholars might dismiss or minimise the relevance of, say, Justice Harry Blackmun's personal foibles – including the revelation that 'number two pencils, needle sharp, neatly-displayed in the pencil holder, need only include one number three or a cracked point to elicit a harsh

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<sup>79</sup> Bob Woodward and Scott Armstrong, *The Brethren* (New York, NY: Simon and Schuster, 1979), p.218.

<sup>80</sup> Robert McKeever, *Raw Judicial Power* (Manchester: Manchester University Press, 1995).

word’ – the personal insights unearthed through hours of interviews have allowed a greater understanding of the minds of the Justices than some other studies that offer hundreds of pages focusing on judicial interpretation.<sup>81</sup>

Secondly, Mann, Woodward and Armstrong have succeeded in proving what many of their more academic-minded contemporaries would presumably dispute, namely, that the inner workings of the Senate and the relationships between the Senators, and the relationships between the Justices of the Supreme Court, are topics which can and do allow for the creation of fascinating work if understood properly, researched well and chronicled competently. Thirdly, Mann, Woodward and Armstrong have taken their work on political science into the realm of collective biography, which has proved to be an appropriate style for my own research, focusing as it does on three men whose lives and careers were linked inextricably for decades.

Finally, both *The Brethren* and *Walls of Jericho* have benefitted from the willingness of the authors to engage with the political process and the individuals they have written about: Mann worked alongside Louisiana Senators Russell Long, John Breaux and J. Bennett Johnston prior to completing *Walls of Jericho*, while Justice Potter Stewart proved to be the main source of information for Woodward and Armstrong, who also interviewed a large number of law clerks who worked alongside Stewart and other Justices of the Supreme Court. My own experience has taught me that a true understanding of the complexities of US politics, particularly as it relates to the South, can be attained only through engaging with individuals who have lived, and contributed to, the political process itself. It was with this view in mind that interviews were conducted with Congressman John Spratt, who represented South Carolina’s Fifth District for nearly thirty years; former Congresswoman Elizabeth J. Patterson, who represented the state’s Fourth District and is the daughter of Olin Johnston; the aforementioned Jaime Harrison, Chairman of the South Carolina Democratic Party, and Congressman James Clyburn, who has represented the state’s Sixth District for twenty-two

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<sup>81</sup> Bob Woodward and Scott Armstrong, *The Brethren* (New York, NY: Simon and Schuster, 1979), p.218.

years, and is currently the Assistant Democratic Whip in the House of Representatives. The research also involved interviews with four members of the Friendship Nine group of protesters – Clarence Graham, W.T. ‘Dub’ Massey, James Wells and David Williamson Jr – who staged the famous ‘jail no bail’ protest in Rock Hill, South Carolina during the sit-in movement of the early 1960s.

Mann, Woodward and Armstrong have proved that archive research constitutes only one part of the process of crafting an effective study of US politics. As they have demonstrated, an effective study depends also upon engagement with the individuals who have lived the experiences being chronicled, and also the development of a writing style that will encourage readers to return to the work regularly over the years.

### **Research Objectives in the Context of the Secondary Literature**

Having offered a review of the existing scholarship on South Carolina’s political history and also the Supreme Court nomination process, the chapter will now conclude with an outline of how each research objective within this thesis will build on the secondary literature while also addressing various gaps and oversights on the part of previous scholars.

Firstly, there is a consensus among scholars that Supreme Court nomination hearings have developed into highly political, and confrontational, public events. Through research objective (1), it will be established that, of all states, South Carolina has played the most important (yet overlooked) long-term role in that process. This is a particularly important research objective in the sense that the current scholarship is dominated by a focus on presidential selection and management, and also a method of study which focuses largely, if not exclusively, on nominees who ultimately failed to be confirmed;

Secondly, while Supreme Court scholars such as Thorpe (1969), Abraham (1999) and Comiskey (2004) have highlighted the Southern influence in the

Supreme Court nomination process, this thesis, through research objective (2), will argue that South Carolina provides the best example of an individual state achieving a disproportionate influence on a national scale through exerting an extraordinary influence in the judicial selection process throughout a lengthy period in the era of civil rights;

Thirdly, given that the state of South Carolina departs from the conventional narrative outlined in studies such as Perry (1991), Abraham (1999) and Yalof (1999), it will be argued, through research objective (3), that the long-term solidarity and consistency of South Carolina's Senators in the Supreme Court nomination process suggests that an analysis of nominations as 'one-off' events is unhelpful and restrictive, particularly when emphasising the role of Senators rather than Presidents;

Fourthly, given the absence of a focus on the politics of the nomination process in the work of Southern political scholars such as Klarman (2004), and also the tendency of Supreme Court nomination scholars such as Massaro (1990), Yalof (1999) and Nemacheck (2008) to focus on methods of presidential selection rather than the impact of states or the role of individual Senators, research objective (4) will bring together the study of the nominations process with the study of Southern political history;

With the good intentions of Huss (1961) failing to provide a comprehensive and impartial political biography of Olin Johnston, and studies such as Simon (1998) focusing only on Johnston's years as Governor, the thesis will offer, by way of research objective (5), a thorough and objective study of ten years in Johnston's Senate career;

Finally, through research objective (6), the thesis will build on the work of McFeeley (1987) by highlighting the importance of South Carolina's role in nominations to the Courts of Appeal, contesting the view of Silverstein (1994) and others that lower court nominations were of little significance during much of the period under study.



In conclusion, this research aims to fill what appears to be a surprisingly large gap in the literature. By rejecting the current trend of analysing nominations as 'stand-alone' events and instead assessing the evolution of the process over time, the research rejects entirely the theory that a lack of Senate rejections constitutes Senatorial 'deference' toward a nominating President. The story of South Carolina and the US Supreme Court suggests that a lack of Senate rejections of Supreme Court nominees reflects only the reality that a single Senator, or a small group of Senators, will find it very difficult indeed to encourage other Senators to support their cause, especially if the cause revolves around controversial, and regional, interests. The behaviour of Olin Johnston, Strom Thurmond and Fritz Hollings in the nomination process for Supreme Court Justices will help to discourage further academic claims of a 'deferential Senate' and instead highlight the fact that the Supreme Court nomination process has always constituted a far more complex, controversial and confrontational arena of debate within the US political system, with the final vote on each nomination representing only a minor aspect of each thrilling story.

The thesis will now proceed to the chapters that consider primary research materials in depth in order to analyse the behaviour of South Carolina's Senators in the Supreme Court nominations process. There is, however, one final item of secondary material to acknowledge, which constitutes something of an oddity in the existing literature. In 1972, Senator Barry Goldwater of Arizona authored an article in the *American Bar Association Journal*, in which the future icon of US conservatism argued at length that a vast number of Supreme Court nominees would have been rejected prior to the early 1960s had Senators applied more 'modern' judgements of nominees' judicial philosophies, as in the case of the Fortas and Haynsworth nominations. Given the enormous significance of Goldwater in the meteoric rise of the US conservative movement, his close political alliance with Strom Thurmond, and his success in the Deep South states in an otherwise disastrous campaign for the Presidency in 1964, which signposted a landmark event in the development of South Carolina's two-party system, it was

deemed necessary to include at least an indication of Goldwater's views on the Supreme Court. As the following chapters illustrate, Goldwater's profound, even poignant, sentiment (outlined at the beginning of this chapter) highlights the concern felt by South Carolina's Senators that the nomination process for the judges who sit on the nation's highest court demanded a more rigorous form of scrutiny in the age of civil rights. As Chapter Two will explain, the South Carolinians would never enjoy the Justices' 'immunity' from political pressures during the 1950s. Following Earl Warren's announcement of the *Brown* decision, Johnston, Thurmond and Hollings would impose a uniquely Southern conservative influence on the politics of the Supreme Court, with the South Carolina political establishment, and the state's white voters, supposedly looking on in anticipation of their success in defending the Southern way of life.

## **CHAPTER TWO:**

### **A Rendezvous with Reality:**

#### **South Carolina and the Judicial Nominations of the 1950s**

*I hope you realise that the only way you can win a case is somebody has to lose.*<sup>1</sup>

John W. Davis to Thurgood Marshall, 1954

Following Chief Justice Earl Warren's announcement, on 17<sup>th</sup> May 1954, of the Supreme Court's *Brown v. Board of Education* decision, South Carolina's political leaders lined up to express their shock. The state's senior US Senator, Burnet R. Maybank, commented that 'the Supreme Court decision shocked me', while Ernest 'Fritz' Hollings, the youthful Speaker Pro Tempore of the South Carolina State House, claimed that the decision to end racial discrimination in all public facilities came as 'a real shock'.<sup>2</sup> In an article from *The Charleston News and Courier* entitled 'Governor Byrnes "Shocked" by High Court Ruling', the state's Governor, James F. Byrnes, expressed his own 'shock' at the *Brown* decision, and urged 'all of our people, white and coloured, to exercise restraint and preserve order.'<sup>3</sup> Some South Carolinians offered more stirring condemnations, such as US Congressman L. Mendel Rivers, who labelled the decision 'a tragic mistake', adding that it created 'one of the gravest problems to confront the white people of the South since the days of Reconstruction', while others expressed more optimistic reflections: Olin D. Johnston, the state's junior US Senator, claimed, 'I

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<sup>1</sup> Juan Williams, *Thurgood Marshall: American Revolutionary* (New York, NY: Random House, 1988), p.229.

<sup>2</sup> Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (Macon, GA: Mercer University Press, 1995), p.254; W.D. Smyth, 'Segregation in Charleston in the 1950s: a Decade of Transition', *The South Carolina Historical Magazine* 92:2 (1991), pp.99-123; p.108; 'School Case Decision Occupies Candidates', *The News and Courier*, 19<sup>th</sup> May 1954, p.1.

<sup>3</sup> 'Governor Byrnes "Shocked" By High Court Ruling', *The News and Courier*, 18<sup>th</sup> May 1954, p.1.

have faith and confidence in the people of South Carolina and I know they are capable of solving this problem, although it is a perplexing one.’<sup>4</sup>

As shocked and perplexed as South Carolina’s politicians wished to appear, it is unlikely that the state’s leaders were entirely surprised by the Court’s decision to rule racial segregation in public schools unconstitutional. For South Carolina, the fight to maintain segregation began long before *Brown*. Ten years earlier, as Governor, Olin Johnston had taken the lead in abolishing the state laws relating to the Democratic Party primary system following the Supreme Court’s *Smith v. Allwright* decision, which had ruled the all-white Democratic primary unconstitutional.<sup>5</sup> When the charismatic black lawyer, Thurgood Marshall, went to South Carolina to challenge the racial segregation of schools in Clarendon County in the *Briggs v. Elliott* case in 1951, a majority of the judges were discouraged from siding with Marshall’s argument by a pledge that South Carolina would invest heavily in order to improve the quality of schools for black children. By the time that *Briggs* was grouped with four other segregation cases and brought before the Supreme Court in the form of *Brown*, Governor James F. Byrnes had implemented a massive long-term strategy to ‘equalise’ South Carolina’s schools, hoping that it would encourage the Justices of the Court to uphold the doctrine of ‘separate but equal’ established by the *Plessy v. Ferguson* decision of 1896. Byrnes utilised his considerable political influence by calling on John W. Davis, one of the most respected US lawyers, to defend South Carolina before the Court, and persuading his friend, President Dwight D. Eisenhower, to prevent the Justice Department from filing an *amicus curiae* (‘friend of the Court’) brief in support of Marshall and the National Association for the Advancement of the Colored People (NAACP).<sup>6</sup>

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<sup>4</sup> ‘Decision is Denounced by S.C. Congressmen’, *The News and Courier*, 18<sup>th</sup> May 1954, p.1.

<sup>5</sup> Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004), p.247; Grace Elizabeth Hale, ‘Of the Meaning of Progress: A Century of Southern Race Relations’, in Craig S. Pascoe et al, *The American South During the Twentieth Century* (Athens, GA: University of Georgia Press, 2005), pp.56-73, p.58.

<sup>6</sup> J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (Oxford: Oxford University Press, 1979), p.26; Anthony J. Badger, ‘From Defiance to Moderation: South Carolina Governors and Racial Change’, in Anthony J. Badger, *New Deal/New South: an Anthony J Badger Reader* (Louisville: University of Arkansas Press, 2007), pp.127-143; p.132.

A colossal figure in South Carolina's politics, Byrnes had represented the state in the US Senate prior to being appointed as a Justice of the Supreme Court by President Franklin D. Roosevelt in 1941. After heading Roosevelt's Office of War Mobilisation, Byrnes served as US Secretary of State in the administration of President Harry S. Truman, during a pivotal era in the early Cold War. His reputation as a statesman is immortalised in the famous photographs of Truman, Clement Atlee and Josef Stalin sitting alongside each other in wicker chairs at the Potsdam Conference in August 1945. Byrnes is one of the four figures standing at the back, flanked by British Foreign Secretary Ernest Bevin and Russian Foreign Minister Vyacheslav Molotov, gently clutching Molotov's arm in the characteristic Byrnes gesture of friendship. In 1950, his election as Governor of South Carolina, aged 68, constituted an overwhelming vote of confidence from both the traditional county communities and the new metropolitan elites.<sup>7</sup>

The implementation of the ambitious 'equalisation' project indicates the long-held belief of Byrnes and others in the genuine possibility of Court-ordered desegregation, not least because the Justices had sided with Marshall and the NAACP in previous landmark cases.<sup>8</sup> Given Byrnes's key role in attempting to prevent the Justices from ruling segregation unconstitutional, it is not surprising that he felt a sense of personal defeat following the announcement of *Brown*. Fritz Hollings, who had supported the Byrnes plan by authoring legislation to 'equalise' the state's schools through imposing a three-cent tax, and who accompanied John W. Davis at the oral arguments, recalled years later that 'Byrnes was totally disillusioned when we lost that case. He'd been on the Court itself, and said we had some dangerous fellows like [Justice] Felix Frankfurter, you couldn't tell which way they'd go, but he knew the Court would find the right thing, and that there wasn't any chance of us losing and what have you, so when

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<sup>7</sup> Jack Bass and Walter DeVries, *The Transformation of Southern Politics* (Athens, GA: University of Georgia, 1995), p.254; Robert Mickey, *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015), p.217; Badger, 'From Defiance', p.132.

<sup>8</sup> Williams, *Thurgood Marshall*, p.149-51; p.175-6; James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy* (Oxford: Oxford University Press, 2002), p.17-18; Adam Fairclough, *Better Day Coming: Blacks and Equality, 1890-2000* (London: Penguin, 2001), p.218; Barbara A. Perry, *A 'Representative' Supreme Court? The Impact of Race, Religion and Gender on Appointments* (London: Greenwood Press, 1991), p.97.

he lost in 1954, that was it.’<sup>9</sup> The Governor would later publish an article entitled ‘The Supreme Court Must Be Curbed’, in which he slammed his former colleagues for ignoring the legal precedent of *Plessy* and instead deciding to ‘legislate a policy for schools’, offering the grave warning that ‘when the next Court is called upon to “read into” the Constitution something which was never there, another segment of the people may be the victim. It may be *you*.’<sup>10</sup>

With *Plessy* now overturned by a unanimous Court, and Byrnes’s ‘equalisation’ project shot down in flames, South Carolina’s concerned white community began calling on a more radical figure in the state’s politics. Although no longer in public office at the time of the *Brown* decision, ex-Governor James Strom Thurmond had already established a national profile by breaking dramatically with the Democratic Party to run for President on an independent ‘states’ rights’ ticket in response to President Truman’s announcement of a civil rights plank at the 1948 Democratic Party Convention.<sup>11</sup> To an audience of wild supporters who knew nothing of the twenty-three year old mixed-race daughter whose identity would remain secret until after his death, Thurmond had declared that ‘there’s not enough troops in the army to force the Southern people to break down segregation and admit the n\*\*\*\*\* race into our theaters, into our swimming pools, into our homes and into our churches.’<sup>12</sup> Having won Electoral College majorities in four Deep South states in the 1948 Presidential Election, Thurmond made a bold challenge to Olin Johnston’s incumbency in the 1950 Democratic Senate primary contest but failed to unseat the popular upcountryman.<sup>13</sup>

Despite his defeat in 1950, many white Southerners sought Thurmond’s advice on the best way to maintain segregation in schools four years later, and the opportunist Thurmond was happy to use the South Carolinian outrage over *Brown*

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<sup>9</sup> Marcia Synnott interview with Ernest F. Hollings, 8<sup>th</sup> July 1980, South Carolina Political Collections, Oral History Project, University of South Carolina [<http://library.sc.edu/file/1786>].

<sup>10</sup> James F. Byrnes, ‘The Supreme Court Must Be Curbed!’, *US News and World Report*, 18<sup>th</sup> May 1956, pp.50-58, p.52.

<sup>11</sup> Charles S. Bullock and Janna Deitz, ‘Transforming the South: The Role of the Federal Government’, in Craig S. Pascoe et al, *The American South in the Twentieth Century* (Athens, GA: University of Georgia Press, 2005), pp.247-262, p.247.

<sup>12</sup> Joseph Crespino, *Strom Thurmond’s America* (New York, NY: Hill and Wang, 2012), p.71.

<sup>13</sup> Fairclough, *Better Day Coming*, p.210.

to make a second attempt at the Senate following the sudden death of the state's senior Senator, Burnet Maybank, in September 1954. Running as a write-in candidate as a means of defying the efforts of the state's Democratic establishment to install state Senator Edgar A. Brown in Maybank's seat, Thurmond prevailed spectacularly, defeating Brown by 145,444 votes to 83,525. Despite the misspelling of his name on the ballot papers of many adoring supporters, 'Strum Thormond' became the first candidate elected to the Senate in a write-in victory.<sup>14</sup>

Olin Johnston and Strom Thurmond proved to be a formidable pairing in the US Senate. The lingering bitterness of their 1950 primary battle aside, the pair had little in common politically or personally. Johnston was a Democratic loyalist who maintained a consistent defence of organised labour, while the lecherous, provocative Thurmond's openly racist demagoguery confirmed a willingness to rebel against party leaders at the state and federal levels. The defence of white supremacy would unite them as they formed a conservative 'bloc' with fellow Southerners in the US Senate as a means of resisting moves toward desegregation. Their persistence in holding the conservative line on the race issue was informed to a great extent by the close and uniquely 'Southern' relationship each man maintained with his constituents. Johnston's daughter, former Congresswoman Elizabeth J. Patterson, recalls that her father's folksy 'biscuits and gravy' style with his supporters became legendary in the state, while former South Carolina Congressman John M. Spratt insists that Thurmond 'had the best constituent service on the Hill, amongst Southerners at least. Back home, they remembered Strom calling on the telephone when somebody died, they remembered his wedding gifts, they remembered his telephone calls at critical moments, things like this.'<sup>15</sup> As with their fellow Southerner, Herman Talmadge, who ensured his constituents in Georgia received written responses within

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<sup>14</sup> Jack Bass and Marilyn W. Thompson, M.W. *Strom: The Complicated Personal and Political life of Strom Thurmond* (New York, NY: Public Affairs, 2005), p.146; Frank E. Jordan, *The Primary State: A History of the Democratic Party in South Carolina, 1896-1962* (self-published; unknown date), p.81; Dewey G. Grantham, *The Life and Death of the Solid South: A Political History* (Lexington, KY: University Press of Kentucky, 1988), p.136; Crespino, *Strom Thurmond's America*, p.98-9.

<sup>15</sup> Interview with Elizabeth J. Patterson, 29<sup>th</sup> September 2014; interview with John Spratt, 28<sup>th</sup> September 2014.

twenty-four hours, both Johnston and Thurmond issued swift and highly affable communications with South Carolinians and many other correspondents from elsewhere in the nation.<sup>16</sup>

Many of the letters which arrived in the offices of South Carolina's Senators represented the worst excesses of racism, particularly in the aftermath of the Little Rock integration crisis of 1957, such as a letter from a resident of Auburn, California, informing Thurmond that 'unless white children can be educated in private schools ... America will soon be a nation of mongrels.'<sup>17</sup> Having received a letter from J.H. Bickley, the Grand Dragon of the South Carolina Ku Klux Klan, Johnston scrawled a note in pencil, advising his staff to 'tell him to rest assured of my efforts to defeat civil rights legislation', but adding, 'don't refer to him as Grand Dragon.'<sup>18</sup> After reading a detailed rant from a South Carolinian urging, 'pray that God prevents the crime of "negro" integration and "colored" bastardism against the white race in America', Thurmond's response opened with, 'Mrs Thurmond and I sincerely appreciate your Christmas card.'<sup>19</sup> On the other hand, some of the writers did engage the Senators in intelligent discussions over complex and highly relevant political issues. When a resident of Florence, South Carolina, asked Thurmond if the Fourteenth Amendment – introduced essentially as a means of ensuring constitutional protection for black Americans following the abolition of slavery – was ratified 'under force', the Senator agreed that it was, and provided a detailed and passionate response. Enclosing a speech which he had made on the very same subject, Thurmond argued that 'the radical Republican majority which was in power in the Congress following the War Between the States forced enough of the Southern states to agree to the ratification before they could be re-admitted into the Union so that the necessary

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<sup>16</sup> 'Herman Talmadge, Georgia Senator and Governor, Dies at 88', *The New York Times*, 22<sup>nd</sup> March 2002.

<sup>17</sup> Letter from Dale Duckworth to Strom Thurmond, 7<sup>th</sup> October 1958, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1958, Box 7, Folder 4-1 (Supreme Court), July 3-December 31, 1958.

<sup>18</sup> Letter from J.H. Bickley to Olin D. Johnston, 6<sup>th</sup> July 1957; Letter from Olin D. Johnston to J.H. Bickley, 9<sup>th</sup> July 1957, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 61, Judiciary Committee, Supreme Court.

<sup>19</sup> Letter from R. Victor Brannon to Strom Thurmond, undated; letter from Strom Thurmond to Mr and Mrs R. Victor Brannon, 1<sup>st</sup> December 1958, , Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1962, Box 7, Folder 4-1 (Supreme Court), July 3-December 31, 1958.



majority was obtained for ratification purposes.’<sup>20</sup> Aside from highlighting the manner in which the lingering bitterness over the South’s treatment after defeat in the US Civil War would inform much of the region’s resistance to civil rights during the twentieth century, the arguments made by Thurmond in this letter would re-surface in the obscure questions offered during his infamous interrogation of Thurgood Marshall during the latter’s Supreme Court confirmation hearings, which are covered in detail in Chapter Four.

Given the sense of ‘shock’ articulated by South Carolina’s political community following the announcement of *Brown*, it is perhaps unsurprising that the unlikely partnership of Johnston and Thurmond offered little in the form of a coherent strategy when tackling the problem of curbing the power of the Supreme Court during the mid-1950s. The nominations to the Court of John Marshall Harlan II, William J. Brennan and Charles Evans Whittaker remained relatively untroubled by South Carolinian agitation, but Johnston’s sustained opposition to the nomination of Simon E. Sobeloff to the Fourth Circuit Court of Appeals would illustrate, firstly, the potential for immense controversy in the nomination process, which would later characterise the Supreme Court nominations of the 1960s, and secondly, the fact that while South Carolina’s war on the Court was provoked by the *Brown* ruling, the agitation of the state’s Senators in the field of judicial appointments would also extend to nominations made to the lower courts. Johnston’s attempt to block Sobeloff’s appointment to the Fourth Circuit suggested a defensive strategy to prevent liberal judges reaching South Carolinian territory, but his obstruction to the appointment of Thurgood Marshall to the Second Circuit, covered in Chapter Three, highlights the insistence of both Thurmond and Johnston that the Supreme Court threatened Americans on a national, not just regional, scale.

The involvement of South Carolina’s Senators in the pursuit of multiple failed attempts to introduce court-curbing legislation reflected a concerted effort to weaken the Court as an institution, yet the battle which would emerge in the

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<sup>20</sup> Letter from Strom Thurmond to A.L. McKenzie, 1<sup>st</sup> January 1958, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1958, Box 7, Folder 4-1 (Supreme Court), January 1-June 23, 1958.

nomination process suggests that Johnston, Thurmond and, later, Senator Ernest 'Fritz' Hollings, considered the liberal ideologies of the individual Justices to be the root cause of the threat posed to the South. As history would prove, this belief was particularly relevant in the case of Chief Justice Earl Warren, the man who led the Supreme Court throughout this most turbulent period of political transformation.

This chapter commences with an assessment of Earl Warren's influence over the Court's decision in *Brown* in order to explain the actions of Southern Senators in applying greater scrutiny in the Supreme Court nomination process, as became evident in the case of Eisenhower's nomination of John Marshall Harlan in 1954. By highlighting the overlooked significance of Olin Johnston through analysing his crusade to block the nomination of Simon Sobeloff to the Fourth Circuit Court of Appeals, the chapter will address research objective (5) by highlighting the significance of the much-overlooked Johnston in the relationship between judicial politics and Southern political history. With the Sobeloff controversy as the chapter's centrepiece, there will be an emphasis on research objective (6) in explaining the significance of Court of Appeals appointments in the wider war on the Supreme Court, and also the contribution of South Carolina's Senators to the intensification of judicial politics with regard to these lower court appointments. The chapter examines the change in behaviour of Southern Senators in the nomination process following, first, the announcement of the Court's decision in *Mallory v. United States*, and, second, Eisenhower's use of federal troops to ensure the integration of Little Rock Central High School in Arkansas. The manner in which the Potter Stewart confirmation hearings suggested the emergence of a more confrontational nomination process, the significance of which will be analysed in subsequent chapters, will also be considered. Finally, the chapter will contribute to the development of research objective (4) by bringing together the study of Southern politics with the history of the modern Supreme Court nomination process in addition to outlining the

beginning of South Carolina's crucial role in escalating the political tension within that complex process.

### **The Finger of Suspicion**

Southern suspicion of Chief Justice Earl Warren began long before the announcement of *Brown*. A former Republican Vice Presidential candidate and Governor of California, who had used his influence to assist Dwight Eisenhower in securing the Republican nomination for the 1952 Presidential Election, Warren was appointed to the Supreme Court to replace the late Chief Justice Fred Vinson on 5<sup>th</sup> October 1953. After serving for three months on a recess appointment before the 'official' nomination was made by President Eisenhower on 11<sup>th</sup> January 1954, Warren was scrutinised by the Senate Judiciary Committee, after which three of its members, Olin Johnston of South Carolina, James Eastland of Mississippi, and Chairman William Langer of North Dakota, voted against his confirmation.<sup>21</sup> Agreeing with Eastland that their opposition was due to a belief in Warren's lack of judicial experience, Johnston complained that a report on Warren by the Federal Bureau of Investigation (FBI), requested by the two Southerners via the Chairman, had failed to materialise.<sup>22</sup> Drew Pearson speculated in *The San Francisco Chronicle* that Eastland's concern over Warren's position on the segregation issue was in fact at the heart of the request for the investigation, but the opposition of Johnston and Eastland became overshadowed by condemnation in the press of Chairman Langer's repeated delays of Warren's confirmation, motivated solely by his continued irritation that no judge from his home state of North Dakota had ever been nominated to the Supreme Court.<sup>23</sup> While the antics of 'Wild Bill' ultimately achieved little – he reportedly 'chewed on

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<sup>21</sup> Henry J. Abraham, *Justices, Presidents and Senators* (New York, NY: Rowman and Littlefield, 1999), p.194.

<sup>22</sup> 'Senate Confirms Warren by Voice', *The New York Times*, 2<sup>nd</sup> March 1954.

<sup>23</sup> 'Opposition to Warren Inspired by Fred Howser', *The San Francisco Chronicle*, 14<sup>th</sup> February 1954; 'Langer v. Warren', *The New York Times*, 18<sup>th</sup> February 1954; 'Judiciary Committee Approves Warren Nomination, 12 to 3', *The Baltimore Sun*, 25<sup>th</sup> February 1954; 'Low in the Smear Line', *St. Louis Post-Dispatch*, 21<sup>st</sup> February 1954; Laurence H. Tribe, *God Save This Honorable Court* (London: Random House, 1985), p.91.

his ever-present unlighted cigar but said nothing' while Warren was confirmed by a unanimous voice vote – the Chairman's eccentric obstructionism masked the scepticism beginning to brew among the Southern members of the Judiciary Committee in their consideration of Supreme Court nominees.<sup>24</sup>

As Chief Justice, Warren remained an unpopular figure in the South, and for two reasons in particular, Southerners remained adamant that the Court's landmark ruling in *Brown* was largely, if not entirely, his fault. The first is that, with one unanimous opinion, written and read from the bench by the Chief Justice himself, it was inevitable that Warren would become the 'face' of the decision. During 1952, when Chief Justice Vinson and several others on the Court, including Justices Stanley Reed, Felix Frankfurter, Robert Jackson and Tom C. Clark, expressed serious concerns over whether the Court could or should overturn *Plessy v. Ferguson*, Governor James Byrnes might have had a good reason to expect the Supreme Court to uphold the constitutionality of South Carolina's segregated schools.<sup>25</sup> Six months later, when the case was re-argued, the death of Vinson from a heart attack and his replacement by the new Chief Justice proved critical, with the dynamic Warren utilising his skills as diplomat, umpire and negotiator to steer the other Justices toward a unanimous opinion, partly through convincing his brethren that a dissenting opinion would be used as a rallying cry by segregationists in the event of a Southern backlash.<sup>26</sup> Marking the fiftieth anniversary of the *Briggs v. Elliott* case in 2002, Fritz Hollings claimed that when Warren arrived on the Supreme Court in late 1953, 'he didn't want to hear about "separate but equal."' He wanted the case re-argued on the constitutionality of segregation itself.<sup>27</sup> Predictably, the final outcome of the *Brown* case became linked inextricably with the considerable influence of Earl Warren in the minds of Southerners during the mid-1950s.

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<sup>24</sup> 'Senate Confirms Warren by Voice', *The New York Times*, 2<sup>nd</sup> March 1954.

<sup>25</sup> Patterson, *Brown v. Board*, p.55-7; Klarman, *From Jim Crow*, p.301.

<sup>26</sup> Tribe, *God Save*, 1985, p.37-8; Patterson, *Brown v. Board*, p.60-5.

<sup>27</sup> *Briggs v. Elliott* Descendants Reunion Banquet Keynote Address by Senator Ernest F. Hollings, 11<sup>th</sup> May 2002, Summerton, South Carolina, South Carolina Political Collections, Oral History Project, University of South Carolina [<http://digital.tcl.sc.edu/cdm/compoundobject/collection/how/id/552/show/547/rec/1>].

The second reason for laying the blame for *Brown* at Warren's door was his inclusion in the opinion, in the form of Footnote 11, of a reference to Gunnar Myrdal's *An American Dilemma*, a critical sociological study of US race relations which had infuriated many in the South when published in 1944, largely for its attack on white prejudice toward African Americans.<sup>28</sup> As Jim Newton has argued, the Myrdal footnote appeared to suggest 'what many Southerners suspected: the Court was striking down school desegregation not because the law commanded it but because modern experts no longer approved of it,' particularly as Warren had added the words 'see generally' to the footnote.<sup>29</sup> This highly negative reaction had been anticipated months earlier by two of the Court's Southerners, Justice Hugo Black of Alabama and Justice Tom Clark of Texas, both of whom had advised Warren against quoting Myrdal's work.<sup>30</sup>

Their fears proved well-founded: in June 1955, South Carolina's Olin Johnston initiated a Southern effort to gather information on the sources of recent Court decisions, teaming up with Mississippi's James Eastland to introduce Senate Resolution 104 as a means of investigating what Johnston described as the 'pink, red or actually communistic sources' of information which he believed to be the inspiration for the Justices' legal reasoning.<sup>31</sup> So keen was Johnston to investigate the Court's sources of information that he wrote to his Mississippi colleague one year later, advising Eastland, by now Chairman of the Senate Judiciary Committee, to set up a sub-committee in order to implement the resolution.<sup>32</sup> Even in a friendly letter to a colleague of the same ideology, Johnston was keen to point out that the *Brown* decision was 'illegal from the Constitutional point of view, unlawful in a jurisprudential sense, and was purely a political

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<sup>28</sup> Gunnar Myrdal, *An American Dilemma: The Negro Problem and American Democracy* (New York, NY: Harper and Bros, 1944); Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York, NY: Riverhead, 2007), p.298.

<sup>29</sup> Newton, *Justice for All*, p.327; Patterson, *Brown v. Board*, p.67.

<sup>30</sup> Patterson, *Brown v. Board*, p.69.

<sup>31</sup> Transcript of James Eastland's Senate speech regarding introduction of Resolution 104, Richard B. Russell Collection Subgroup E, Series 4: Vertical Files, Box 4, Folder 64; letter from Olin D. Johnston to James Eastland, 15<sup>th</sup> March 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, School Segregation.

<sup>32</sup> Letter from Olin D. Johnston to James Eastland, 15<sup>th</sup> March 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, School Segregation.

pronouncement based upon psychological, sociological and other non-judicial, unfactual theories and fallacies.<sup>33</sup>

For many in the South, Warren's authorship of the *Brown* ruling, and his insistence on quoting 'generally' a controversial work such as Myrdal, suggested that the Chief Justice had brought his private motivations into the decision to order the desegregation of schools. South Carolina's Strom Thurmond, who had proved his willingness to lead disenchanted Southerners out of the Democratic Party when he headed the 'Dixiecrat' presidential ticket in 1948, put his criticism of Warren at the centre of his warning of a second Southern 'bolt' from the party, arguing that 'Democratic Presidents appointed eight of the nine judges on the Court at the time of the [*Brown*] decision, and President Eisenhower appointed the man who wrote the opinion ... The South blames both parties.'<sup>34</sup> The truth of Eisenhower's position on the segregation issue was more complex. Mindful of Southern fears of a desegregation order well before *Brown*, the President had considered at least two Southern judges to replace the Kentuckian Chief Justice Vinson.<sup>35</sup> With John W. Davis's advanced age ruling him out, and Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit tainted by the Senate's rejection of his nomination to the Supreme Court by President Herbert Hoover in 1930, Eisenhower chose instead to honour a private promise, made long before, that Earl Warren would be put forward for the first Court vacancy to come up during his Presidency.<sup>36</sup>

The Senate Judiciary Committee hesitated when, on 9<sup>th</sup> November 1954, Eisenhower nominated Judge John Marshall Harlan II of the United States Court of Appeals for the Second Circuit, to replace the late Justice Robert Jackson on the Supreme Court. Having seen the outcome of Earl Warren's confirmation over their objections, Southerners Johnston and Eastland were determined to ensure a full

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<sup>33</sup> Letter from Olin D. Johnston to James Eastland, 15<sup>th</sup> March 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, School Segregation.

<sup>34</sup> 'Thurmond Warns Of A Third Party', *The New York Times*, 21 August 1955, p.53.

<sup>35</sup> Jim Newton, *Eisenhower: The White House Years* (New York, NY: Anchor, 2011), p.116; p.252; Dwight D. Eisenhower, *Mandate for Change: The White House Years, 1952-1956* (New York, NY: Signet, 1962), p.284; Newton, *Justice for All*, p.113-4.

<sup>36</sup> David A. Yalof, *Pursuit of Justices* (Chicago, IL: University of Chicago Press, 1999), p.47-9.

background check on Eisenhower's second Supreme Court nominee. The Committee initially declined to act on the nomination, made only one week after the 1954 mid-term elections, forcing Eisenhower to re-nominate Harlan in January 1955, by which time the Democratic Party had taken control of the Senate, with Republican William Langer replaced as Judiciary Committee Chairman by Democrat Harley Kilgore of West Virginia.<sup>37</sup> The Harlan nomination illustrates the manner in which Southern Senators, still reeling from the announcement of *Brown* and still considering methods of counter-attack, were not yet prepared to oppose Supreme Court nominations by declaring openly their concern over a nominee's position on segregation. While happy to speak at length on their reservations regarding Harlan, the comments offered by Southerners obscured, or at the very least blunted, the true motivation for their obstruction during Committee hearings.

The appearance of Supreme Court nominees before the Senate Judiciary Committee had been very rare up until the mid-1950s, but the Southern influence on the Committee was sufficient to bring Harlan before them to testify.<sup>38</sup> The one mention of segregation throughout two days of hearings occurred during a round of questions from James Eastland, who, when putting to Harlan a query 'requested by a member of the Senate to propound', appeared adamant that the segregation issue had no relevance to his interrogation:

**Senator Eastland:** I do not think you understood the question. This is not a case – this is not a question that would come before the Court. It says –

*Do you believe that the Supreme Court should change established interpretations of the Constitution to accord with the economic, political and sociological views –*

that is, the personal views –

*of the judges who from time to time constitute the membership of the Court?*

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<sup>37</sup> David A. Nichols, *A Matter of Justice: Eisenhower and the Civil Rights Revolution* (New York, NY: Simon and Schuster, 2007), p.79.

<sup>38</sup> Abraham, *Justices*, p.197.

**Judge Harlan:** I misinterpreted the question.

**Senator Eastland:** I knew you did.

**Judge Harlan:** The purport of your inquiry. To lay the inquiry bare, as I understand it, you are asking me how I would have voted on the segregation issue?

**Senator Eastland:** No, sir. That has not anything to do with it. What he is asking you is this – it is not my question – do you think that a judge should interpret the Constitution in accordance with the personal views of that judge on economic, political or sociological questions?

**Judge Harlan:** That gives a different thrust to the question. No, sir.<sup>39</sup>

The ongoing debate regarding the Bricker Amendment – a proposed adjustment of the US Constitution that would have reduced the President's authority in signing future treaties with foreign powers – led Senators to focus on the nominee's views regarding 'world government' throughout most of the hearings.<sup>40</sup> But the brief mention of 'the segregation issue', brought into the hearings by Harlan rather than Eastland, is significant for providing the first example of a Southern Judiciary Committee member probing a nominee's attitude toward *Brown* by offering questions which supposedly referred only to the issue of constitutional interpretation.

On the Senate floor, Eastland maintained that he was opposed to Harlan for his views on US sovereignty, his lack of judicial experience, and the fact that he came from the state of New York, a state in which, according to Eastland, people 'possess views and philosophies which are different from the viewpoints of the rest of the country.'<sup>41</sup> Given that Harlan had spent only one year on the Second Circuit, his relative lack of judicial experience was an obvious weakness for Southerners to exploit. Both Eastland and Johnston were happy to press the point, as they had done the previous year with the Warren nomination, and the fact that the nominee was the grandson of the earlier Justice John Marshall Harlan of Kentucky, who had rejected the 'separate but equal' doctrine in the sole

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<sup>39</sup> Hearings Before the Committee of the Judiciary, United States Senate, Eighty-Fourth Congress, First Session on Nomination of John Marshall Harlan, of New York, to be Associate Justice of the Supreme Court, printed for the use of the Committee on the Judiciary, U.S. Government Printing Office (1967), 24<sup>th</sup> February 1955, p.140.

<sup>40</sup> 'Senate Confirms Harlan to Bench', *The New York Times*, 17<sup>th</sup> March 1955, p.1.

<sup>41</sup> *Ibid.*, p.1.



dissenting opinion in *Plessy*, was unlikely to inspire reverence among other Deep South Democrats.<sup>42</sup> Johnston also concurred with Eastland regarding the 'world government' issue, claiming he feared that Harlan 'would put the United Nations above the United States Constitution.'<sup>43</sup> Senator Richard Russell of Georgia, the leader of the Southern bloc in the Senate, echoed the concerns regarding Harlan's judicial experience, and added that 'I do not propose, Mr President, to vote to advise and consent to the nomination of any judge to the Supreme Court bench who has not had considerable judicial experience under the restraint of precedent.' Russell was asked to yield by his Southern colleague, Senator Sam Ervin of North Carolina, who pointed out that 'of the eight present members of the Supreme Court of the United States, only one had as much as a single second's judicial experience on an appellate court or a court of general jurisdiction prior to his elevation', to which Russell responded, 'I am quite confident that that the statement made by the distinguished Senator from North Carolina is correct.'<sup>44</sup>

As with Eastland's criticism of the state of New York, the ambiguity of the comments made during the Russell/Ervin double act did not prevent *The New York Times* from making the rather obvious observation that 'all of the Senators who voted against confirmation come from states where opposition to integrated schools is strong.'<sup>45</sup> Just as Southern Senators sought to offset charges of racism by arguing that Earl Warren's opinion in *Brown* contained no references to precedent or legal text but did refer 'generally' to a sociological study written by a non-American author, the Southern bloc would adopt an obstructive position to Supreme Court nominees by emphasising concerns with judicial interpretation, the specific wording of the US Constitution, and, of course, the 'economic, social or political' views of the Court's Justices.<sup>46</sup>

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<sup>42</sup> Michael A. Kahn, 'Shattering the Myth About President Eisenhower's Supreme Court Appointments', *Presidential Studies Quarterly* 22:1 (Winter 1992), pp.47-56, p.51.

<sup>43</sup> 'Harlan Hearing Held by Senators', *The New York Times*, 25<sup>th</sup> February 1955, p.8.

<sup>44</sup> Remarks of Senator Richard B. Russell before the United States Senate on 16<sup>th</sup> March 1955 on Nomination of John Marshall Harlan to be Associate Justice of the Supreme Court, Richard B. Russell Collection Subgroup C, Series 10: Civil Rights, Box 27, Folder 11.

<sup>45</sup> 'Senate Confirms Harlan to Bench', *The New York Times*, 17<sup>th</sup> March 1955, p.1.

<sup>46</sup> Newton, *Justice for All*, p.341.

Away from the deliberations in the Senate, the comments of Johnston's South Carolina colleague, Strom Thurmond, suggested that the Supreme Court nomination process would soon emerge as an arena of battle between the Eisenhower Administration and the South. With his belief that 'there is little apparent concern over whether the new members of the courts will follow the Constitution instead of the psychology books', the junior Senator made a speech before The Southern Society at the Plaza Hotel in Harlan's home state of New York, only days after the nomination was announced.<sup>47</sup> In a bold statement of intent which only hinted at his controversial future in the Supreme Court nomination process, Thurmond pledged 'to consider carefully every nomination made by the Chief Executive to the courts and to other positions of power. If I find the appointee, by his actions and statements, to be disqualified for the trust he would assume, I shall vote against his confirmation.'<sup>48</sup> In the final words of the speech, Thurmond announced that 'the Supreme Court by its decree has impeded the progress made in seventy-five years of work to provide equal and adequate public education for the white and Negro children of the South. No accuser can point his finger in any other direction with as much accuracy.'<sup>49</sup> South Carolina's war on the Supreme Court had been declared.

Despite their reluctance during the Harlan hearings to push the segregation issue, or even mention it by name, Southern Senators had registered their first significant protest against a Supreme Court nominee in the aftermath of *Brown*. Unlike Warren, who was approved by a unanimous voice vote, Harlan's confirmation was opposed by eleven Southern Democrats. Joining Johnston, Eastland, Russell and Ervin in opposition were Senators Lister Hill of Alabama, John McClellan of Arkansas, George Smathers of Florida, John C. Stennis of Mississippi, and the newly-elected freshman Senator from South Carolina, Strom Thurmond. Republican William Langer maintained his cigar-chewing bitterness

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<sup>47</sup> Weekly radio report by Senator Strom Thurmond, 15<sup>th</sup> July 1955, p.4, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, Originals (1947-1970), Statements, Box 4, Folder 48.

<sup>48</sup> Address by Senator Strom Thurmond Before the Southern Society at the Plaza Hotel, New York, 14<sup>th</sup> January 1955, p.22, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries A, General File (1935-1983), Addresses 1955, Box 7, Folder 604.

<sup>49</sup> Address by Senator Strom Thurmond, Plaza Hotel, New York, p.24.

over the fact that no-one from North Dakota had been chosen, and was joined in opposition by only one other member of his party, Senator Herman Welker of Idaho, making the final vote, on 16<sup>th</sup> March 1955, a total of 71-11 in favour of confirmation.<sup>50</sup> The two Republicans aside, the vote seemed to reflect Olin Johnston's view, expressed in a letter to a South Carolina constituent, that 'the Southern states are alone in this battle against the Supreme Court decision.'<sup>51</sup>

Only one month after Harlan's confirmation, the Supreme Court heard arguments from school boards requesting relief from the order to desegregate issued in the *Brown* ruling. In a decision commonly referred to as 'Brown II', the Court ruled, on 31<sup>st</sup> May 1955, that school authorities were required to ensure desegregation 'with all deliberate speed', a term which Justice Hugo Black later regretted, recognising that the ambiguity of the Court's language would effectively 'authorise' Southern leaders to drag their heels in implementing the desegregation of their schools.<sup>52</sup> Blaming Justice Felix Frankfurter for the inclusion of 'all deliberate speed' in the ruling, Black frequently claimed to his law clerks that 'I should never have let Felix get that into the opinion.'<sup>53</sup> The Court's leniency allowed Judge John J. Parker of the Fourth Circuit Court of Appeals to declare that the Justices were merely forbidding segregation, rather than demanding integration.<sup>54</sup>

Thurmond praised the efforts of his former speechwriter, Robert M. Figg, who had defended the Clarendon County school district which had been the original setting for the *Briggs v. Elliott* case, and who had argued before the Justices in 'Brown II' that 'the handling of this problem should be left to those familiar with local conditions.'<sup>55</sup> In the event, the Court sided with the Federal Government's brief, argued by Solicitor General Simon Sobeloff, which laid out an

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<sup>50</sup> 'Senate Confirms Harlan to Bench', *The New York Times*, 17<sup>th</sup> March 1955, p.1.

<sup>51</sup> Letter from Olin D. Johnston to Reverend John H. Wrenn, 8<sup>th</sup> February 1955, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 46, Civil Rights, General.

<sup>52</sup> Wilkinson, *From Brown to Bakke*, p.81; Fairclough, *Better Day Coming*, p.220; Bullock and Deitz, 'Transforming the South', p.251.

<sup>53</sup> Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon and Schuster, 1979), p.40.

<sup>54</sup> J.W. Peltason, *58 Lonely Men: Southern Federal Judges and School Desegregation* (Chicago, IL: University of Illinois Press, 1971), p.22-3.

<sup>55</sup> Weekly radio report by Senator Strom Thurmond, 15<sup>th</sup> July 1955, p.1, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Statements 1955, Box 4, Folder 48.

assertive plan for the enforcement of *Brown*, albeit in wording which was toned down by President Eisenhower, reportedly in his own handwriting, to avoid 'rhetoric that might shame the South.'<sup>56</sup>

Thanks to the outcome of 'Brown II', South Carolina's Senators were now acquainted with a brand new nemesis in the struggle over segregation.

### **The Man From Maryland**

President Eisenhower's nomination, on 14<sup>th</sup> July 1955, of Simon Sobeloff to the United States Court of Appeals for the Fourth Circuit signposted the first truly significant battle waged by South Carolina in the lengthy war inspired by the high court's ruling in *Brown*. Despite the fact that the selection was made for a lower court vacancy, rather than the Supreme Court, the outrage of Olin Johnston, Strom Thurmond and other South Carolinians over the Solicitor General's nomination was logical. The Fourth Circuit Court of Appeals (which comprised the states of Maryland, Virginia, West Virginia, North Carolina and South Carolina) had been without a South Carolinian judge since the death of Charles A. Woods in 1925, and President Eisenhower was now proposing to appoint Sobeloff, who was from Baltimore, Maryland, following the promotion to senior status of Judge Morris A. Soper, also from Maryland.<sup>57</sup> Where South Carolina's Senators considered *Brown* an insult to the South, they were able to portray the Sobeloff nomination as an insult to the state of South Carolina specifically. In so doing, Johnston and Thurmond could play down claims that their opposition was due to Sobeloff's role in presenting the Federal Government's brief before the Supreme Court during the 'Brown II' arguments.<sup>58</sup>

Unlike Warren and Harlan, whose ambiguous positions on the race issue offered little opportunity for attack during debates over their appointments to the

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<sup>56</sup> Nichols, *A Matter of Justice*, p.70; 'Decision Pleases Many in Congress', *The News and Courier*, 1<sup>st</sup> June 1955, p.26.

<sup>57</sup> Letter from Olin D. Johnston to William Langer, 25<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>58</sup> Nichols, *A Matter of Justice*, p.86.

high court, Sobeloff's role in 'Brown II' appeared to confirm what South Carolina's Senators had suspected: the President of the United States was prepared to back the appointment of judges who openly supported the *Brown* ruling. If Eisenhower genuinely believed that the selection of such a nominee would prove less controversial because the vacancy existed on a lower court, rather than the Supreme Court, his prediction proved ill-judged. As if the imposition of such a judge on their own turf was not enough, Johnston and Thurmond were no doubt mindful of the fact that Sobeloff's appointment to the Fourth Circuit made his elevation to the Supreme Court an increasingly likely possibility: as David A. Nichols has argued, Eisenhower and his Attorney General, Herbert Brownell, were 'grooming' Sobeloff for the Supreme Court's 'Jewish seat' in the event of the elderly Justice Felix Frankfurter deciding to retire.<sup>59</sup>

As in the case of John Marshall Harlan, the Sobeloff nomination was blocked immediately by Johnston and James Eastland in order for a thorough investigation into the nominee's background to take place. Of particular concern was a speech given by Sobeloff before the Judicial Conference of the Fourth Circuit, during which he reportedly claimed that 'the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication, it is in many instances the final formulator of national policy.'<sup>60</sup> *The Washington Post-Times Herald* claimed that Sobeloff's argument on behalf of the Federal Government in 'Brown II' formed the 'real' objection of both Johnston and Eastland, who remained 'wholly unappeased by the fact that [Sobeloff] advocated a course of statesmanly moderation in applying the segregation decision.'<sup>61</sup> The nomination would ultimately meet the same fate as Harlan's, with the delay causing Sobeloff's nomination to expire under Section 6 of Rule 38 (Standing Rules of the Senate), forcing Eisenhower to re-nominate him at the start of the next Congress.<sup>62</sup>

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<sup>59</sup> *Ibid.*, p.86.

<sup>60</sup> 'Obstructionism', *The Washington Post-Times Herald*, 28 July 1955, p.14.

<sup>61</sup> *Ibid.*, p.14.

<sup>62</sup> Letter from Olin D. Johnston to Harley M. Kilgore, 13<sup>th</sup> January 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 3.

Never one to miss an opportunity to influence events in a manner which might raise his public profile, Thurmond proposed, as an alternative nominee, his former speechwriter, Charleston resident Robert Figg, and continued to push Figg's appointment throughout the controversy.<sup>63</sup> As a result, Sobeloff and Figg – the two men who had argued against one other during the South Carolina segment of 'Brown II' – were now being set up as opponents once again, this time as potential nominees for a vacancy on the Fourth Circuit. One frequently overlooked yet particularly notable aspect of the Sobeloff episode is the fact that Thurmond, in offering his personal recommendation, was effectively pushing Eisenhower to choose between the man who had argued for the desegregation of Southern schools in 'Brown II', and the man who had made the counter-argument on behalf of South Carolina in the very same case.

When Eisenhower re-nominated Sobeloff in January 1956, Johnston – who, like Thurmond, was facing re-election – remained determined to use his position on the Judiciary Committee to defend the honour of South Carolina.<sup>64</sup> With Thurmond dismissing Sobeloff by claiming 'I do not know the appointee or his qualifications', Johnston composed a detailed letter to Judiciary Committee Chairman Harley Kilgore, declaring, 'Since I am vitally interested in any nomination to the Fourth Circuit Court of Appeals, I would sincerely appreciate your instructing the staff member handling receipts of such nominations to immediately and personally notify me of receipt of any new nomination, because I may not be present on the floor of the Senate to hear them read when they come over.'<sup>65</sup> Only two days later, Johnston wrote a longer and more detailed letter to the Chairman, requesting that Kilgore set up a sub-committee to look into the fact that Sobeloff had been paid \$30,000 to investigate The Baltimore Trust Company, and later represented clients with claims against the same company.<sup>66</sup> In response to Johnston's request for careful scrutiny of the nominee, Sobeloff was quoted in

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<sup>63</sup> Nichols, *A Matter of Justice*, p.86.

<sup>64</sup> *Ibid.*, p.87.

<sup>65</sup> Letter from Olin D. Johnston to Harley M. Kilgore, 11<sup>th</sup> January 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 3.

<sup>66</sup> Letter from Olin D. Johnston to Harley M. Kilgore, 13<sup>th</sup> January 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 3.

the press as declaring, 'it is undoubtedly the privilege of the Senator to inquire, and it will be my pleasure to answer his questions, and the sooner the better.'<sup>67</sup>

The nomination was complicated by two crucial developments during the month of February. The first, at the start of the month, was the elevation of Judge Armistead M. Dobie to senior status, which created a second vacancy on the Fourth Circuit. Secondly, at the end of the month, the Judiciary Committee was without a Chairman following the sudden death of Senator Harley Kilgore from a cerebral haemorrhage. The fact that arch-segregationist James Eastland was next in line for the chairmanship caused consternation among many, both inside and outside the Senate, but Democratic Majority Leader Lyndon Johnson, who chaired the party's Steering Committee, realised that the Senate's Southern bloc would react unfavourably to any effort to prevent the Mississippian inheriting the chairmanship.<sup>68</sup> With Eastland succeeding Kilgore as Chairman, Olin Johnston now had his closest ally on the Committee in the most influential position of all, but on the other hand, the opening-up of the second vacancy on the Fourth Circuit would potentially be used by the Eisenhower Administration as an olive branch to satisfy the demands of South Carolinians, which might undermine Johnston's principal argument against Sobeloff.

In a newsletter dated 12<sup>th</sup> April 1956, Johnston made clear to his supporters that he was entirely committed to opposing the Sobeloff nomination, taking the trouble to point out, in terms worthy of Thurmond, that 'I believe it is vital for every South Carolinian to know that President Eisenhower is directly to blame for the farm woes, the civil rights turmoil, our textile industrial problems, our failures in international diplomacy, the steady destruction of our states' rights and the many other serious problems that face our people today.'<sup>69</sup> Following an announcement on the Senate floor, the Senator submitted a full account of the conflict-of-interest charges – as offered by a Mr Charles Shankroff of Baltimore,

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<sup>67</sup> 'Inquiry By Senate On Sobeloff Urged', *The New York Times*, 15 January 1956, p.31.

<sup>68</sup> Maarten Zwieters, 'James Eastland and the Shadow of Southern Democrats, 1928-1966', PhD dissertation (printed by Chris Russell, Groningen, The Netherlands, 2012), p.212.

<sup>69</sup> Newsletter from the office of Olin D. Johnston, 12<sup>th</sup> April 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

Maryland – to a Senate Judiciary sub-committee chaired by Senator Joseph C. O'Mahoney of Wyoming, which began public hearings into the nomination on 5<sup>th</sup> May 1956.<sup>70</sup> Having refuted Shankroff's charges before the Senate sub-committee while sitting alongside Senator J. Glenn Beall of Maryland, Simon Sobeloff composed a five-page letter to Chairman O'Mahoney, in which he provided detailed responses to each of the charges. Without commenting on Johnston or the other Southerners opposing his nomination, the Solicitor General concluded that 'it is sheer presumption of [Mr Shankroff] to suggest after two decades that he has found irregularities that have been overlooked by a community and its press that were watching these proceedings with keenest interest.'<sup>71</sup> In addition to the support of both Maryland Senators, Sobeloff was backed by an impressive range of judges, lawyers and businessmen from Washington, DC, and his home state.<sup>72</sup>

Now recognised as Sobeloff's 'arch challenger' by *The Washington Post-Times Herald*, and criticised for his obstructionism in various other newspapers, Johnston showed no sign of relenting in his crusade. Hitting back against his critics in a newsletter, the Senator took the opportunity to reassure his constituents that he would continue to block the nomination.<sup>73</sup> In late April and early May, the expansion of Johnston's investigation of Sobeloff's background was aided by the Columbia-based law firm of Tompkins, Tompkins and McMaster, with John Gregg McMaster forwarding to the Senator a revelation that Sobeloff had spoken favourably of recording jury deliberations, a practice which, allegedly, had been condemned by Attorney General Herbert Brownell. Johnston discovered that Sobeloff had attended a judicial conference in Denver, Colorado, during which recordings of jury deliberations were played and Sobeloff reportedly 'made no

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<sup>70</sup> Speech delivered by Senator Olin D. Johnston on the floor of the Senate, 17<sup>th</sup> May 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Folder 4.

<sup>71</sup> Letter from Simon E. Sobeloff to Joseph C. O'Mahoney, 20<sup>th</sup> May 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4; 'Sobeloff Supported At Hearing', *The Washington Post-Times Herald*, 6<sup>th</sup> May 1956, p.B5.

<sup>72</sup> 'Sobeloff Supported At Hearings', *The Washington Post-Times Herald*, 6<sup>th</sup> May 1956, p.B5.

<sup>73</sup> Newsletter from the office of Olin D. Johnston, 8<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4; 'Johnston Raps Sobeloff Appointment', *The Washington Post-Times Herald*, 5<sup>th</sup> June 1956 p.17, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.



protest.’<sup>74</sup> As Senator Beall of Maryland later observed, ‘it is doubtful if any judicial nomination has received more minute examination.’<sup>75</sup> Before long, President Eisenhower became frustrated with the delay, criticising the Senate Judiciary Committee during a news conference on 23<sup>rd</sup> May and defending his selection of the controversial nominee.<sup>76</sup>

The Sobeloff nomination divided the members of the Senate Judiciary Committee.<sup>77</sup> Minutes from a Committee meeting which took place on 25<sup>th</sup> June 1956 suggest that the discomfort of some members with Johnston’s agenda must have been palpable.<sup>78</sup> Chairman Eastland began by recognising Senator O’Mahoney, who requested a special meeting to take a roll call vote on Sobeloff’s nomination. Perhaps unsurprisingly, the cantankerous, cigar-chewing William Langer of North Dakota recalled a similar experience regarding the Eighth Circuit Court of Appeals, and queried the details of the last occasion on which a South Carolinian was appointed to the Fourth Circuit, receiving confirmation from Johnston that the last appointment of a South Carolinian judge occurred in 1913. Senator Langer then raised the complicated issue of the second vacancy. The fact that the Eisenhower Administration was refusing to nominate a judge for this vacancy until the Committee acted on the Sobeloff nomination must have put pressure on O’Mahoney, who was chairing the sub-committee.<sup>79</sup>

In order to confirm the position of the Administration, Chairman Eastland read to the Committee a letter from Attorney General Brownell dated 8<sup>th</sup> June, in which Eastland had been assured that the matter of the second vacancy was ‘under active consideration.’ Adding a ‘respectful’ reminder that the first vacancy had been outstanding for over a year, Brownell had urged that ‘anything that the Committee does to expedite action on [the Sobeloff] nomination, which is still

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<sup>74</sup> Notes of Olin D. Johnston on letter from John Gregg McMaster to Olin D. Johnston, 1<sup>st</sup> May 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>75</sup> ‘Sobeloff Reports Go to Senate; Way Clear for Judgeship Action’, *The New York Times*, 7<sup>th</sup> July 1956, p.34.

<sup>76</sup> Nichols, *A Matter of Justice*, p.87.

<sup>77</sup> ‘Johnston Raps Sobeloff Appointment’, *The Washington Post-Times Herald*, 5<sup>th</sup> June 1956, p.17, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>78</sup> Excerpt from Minutes of Full Committee Meeting Held on Monday 25<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>79</sup> Nichols, *A Matter of Justice*, p.88.

pending before it, would considerably alleviate the pressure on the Court.’<sup>80</sup>

Senator O’Mahoney moved that a vote on the Sobeloff nomination be made the first order of business at a special Committee meeting to take place that same week. The Committee took a roll call vote on O’Mahoney’s motion, with votes of ‘nay’ registered by Southern Democrats Johnston, Eastland, and Price Daniel of Texas, joined by one Republican, Langer, with the five other members present voting ‘yea’. Among the five voting in favour, Democrat O’Mahoney was joined by three Republicans – Everett Dirksen of Illinois, Arthur V. Watkins of Utah and John Marshall Butler of Maryland – in addition to the moderate Southern Democrat Estes Kefauver of Tennessee.<sup>81</sup>

While the minutes suggest that Committee members were prepared to respect senatorial courtesy by recognising Johnston’s right as a South Carolinian Senator to withhold consent on a nomination to the Fourth Circuit, the result of the roll call vote suggested that most members were keen to draw the on-going obstructionism to a close. Furthermore, the minutes indicate that Johnston’s position was supposedly fireproof, not only because the sympathy of the new Chairman was guaranteed, but also because he could simply insist that South Carolina had missed its turn, rather than been deprived of a judicial appointment altogether. He was able to press the point further the very same day, in a detailed written response to Senator Langer’s query, in which he informed the North Dakotan that ‘there have been two judges [on the Fourth Circuit] from every state except Maryland, which has three. If Mr Sobeloff is confirmed, Maryland will have had four in comparison to two from every other state ... according to the rotation of appointments, South Carolina should be recognised.’<sup>82</sup>

Despite the lukewarm feelings within the Committee, several letters from Johnston’s constituents suggested widespread support for his actions in South

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<sup>80</sup> Letter from Herbert Brownell to James O. Eastland, 8<sup>th</sup> June 1956, in excerpt from Minutes of Full Committee Meeting Held on Monday 25<sup>th</sup> June 1956, p.2, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Judiciary Committee, General, Folder 4.

<sup>81</sup> Excerpt from Minutes of Full Committee Meeting Held on Monday 25<sup>th</sup> June 1956, p.3, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>82</sup> Letter from Olin D. Johnston to William Langer, 25<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

Carolina. One anonymous writer urged the Senator to 'call upon all available help' to prevent Sobeloff's confirmation, observing that 'some politicians seem determined to set the South up for a raping.'<sup>83</sup> Others focused on Sobeloff's religion, with one resident of Lexington writing, 'Tell me who the honourable man is, please: Name sounds like a Greek, or other foreigner. Is he a churchman? Or what?'<sup>84</sup> The Senator responded that Sobeloff 'is active in the Jewish faith', adding that 'the press reported that he received the "Man of the Year" Award last year from the B'Nai B'rith fraternity.'<sup>85</sup> One resident of Columbia presumably hoped that Johnston would agree with his view that 'when one reads of the success of certain "Jewish groups" in running the government in this country ... it just seems that they are so well-mobilised, and organised, that it's almost impossible to "sidetrack" any important matter which concerns them.'<sup>86</sup> Perhaps inevitably, Johnston's continued opposition to the nominee led to accusations of anti-Semitism, to which the Senator responded, 'I have never persecuted the Jewish race at any time', claiming that, in South Carolina, 'the Jewish people have supported me as near as 100 per cent as any race of people.'<sup>87</sup>

Following Lyndon Johnson's intervention, Chairman Eastland was persuaded to allow a vote on the Sobeloff nomination in Committee, on 29<sup>th</sup> June, despite Olin Johnston twice objecting.<sup>88</sup> On 6<sup>th</sup> July, eight members of the Judiciary Committee voted to send the nomination to the Senate for a vote, with Johnston joined by only Chairman Eastland in opposition.<sup>89</sup> As a means of accommodating disgruntled Southerners while drawing the Sobeloff debacle to a close, Lyndon Johnson allowed a lengthy debate to take place on 16<sup>th</sup> July.<sup>90</sup>

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<sup>83</sup> Card from anonymous writer to Olin D. Johnston, undated, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>84</sup> Letter from Samuel B. George to Olin D. Johnston, 10<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>85</sup> Letter from Olin D. Johnston to Samuel B. George, 14<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>86</sup> Letter from George W. Thomas to Olin D. Johnston, 19<sup>th</sup> July 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>87</sup> 'Senate Action on Sobeloff Blocked', *The Spartanburg Herald-Journal*, 29<sup>th</sup> June 1956, p.1.

<sup>88</sup> 'Senate Unit Delays Voting on Sobeloff', *The New York Times*, 28<sup>th</sup> June 1956, p.11; Nichols, *A Matter of Justice*, p.87.

<sup>89</sup> Telegram from Olin D. Johnston to Mr and Mrs O.K. McDaniel, 29<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, box 54; letter from Olin D. Johnston to C. Allen Ashley jr, 29<sup>th</sup> June 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>90</sup> Nichols, *A Matter of Justice*, p.87.

Making his final stand, Olin Johnston began by asking other Senators not to interrupt him during his speech, before addressing the press criticism that he and Eastland had endured for their handling of the nomination.<sup>91</sup> Claiming to have a three-fold objection to the nominee, Johnston led with ‘tradition and every consideration of the rights of the state of South Carolina’, followed by Sobeloff’s involvement in the alleged conflict of interest, and concluding with the nominee’s philosophy concerning states’ rights, which ‘are repugnant to me and the overwhelming majority of the good people whom I have the honor to represent.’<sup>92</sup> Turning to the disrespect shown to South Carolina with regard to the rotation of appointments, the Senator pointed out that Eisenhower had won more than one hundred thousand votes in the state in the 1952 Presidential Election, and argued that ‘the nomination now pending is an insult’ to most of the President’s South Carolinian supporters.<sup>93</sup> In discussing the Shankroff charges, Johnston conceded that ‘the majority report states that the charges against the nominee are baseless’, but switched the focus of the argument to suggest that Charles Shankroff had been discredited as a witness when he had had a right to be heard, before launching into a lengthy and interminable discussion of the facts surrounding the alleged conflict of interest.<sup>94</sup>

In asking Johnston to yield for questions, James Eastland engaged his Southern colleague in a familiar routine of using pointless queries to ensure an emphasis on certain points. In response to Eastland’s question, ‘we are in an era of judicial tyranny, are we not?’, Johnston replied, ‘There is no question about that in my mind.’<sup>95</sup> Perhaps inevitably, the discussion turned to the issue of the Supreme Court, with Eastland wondering if Sobeloff ‘has the same philosophy as Chief Justice Warren and Associate Justice Black and Associate Justice [William O.] Douglas’, to which Johnston replied, ‘His philosophy of life is very closely aligned

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<sup>91</sup> Speech of Hon. Olin D. Johnston of South Carolina in the Senate of the United States, In Opposition to Confirmation Mr Simon E. Sobeloff for Judge of United States Fourth Circuit Court of Appeals, Congressional Record, Proceedings and Debates of the 84<sup>th</sup> Congress, Second Session, p.1; Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4.

<sup>92</sup> *Ibid.*, p.1.

<sup>93</sup> *Ibid.*, p.2.

<sup>94</sup> *Ibid.*, p.3-8.

<sup>95</sup> *Ibid.*, p.8.

with their philosophy of life.’<sup>96</sup> The South Carolinian concluded by urging the Senate ‘to be practical’ by rejecting the Sobeloff nomination.<sup>97</sup> Throughout the debate, Johnston was able to point to the solid support of Southern Democratic Senators from the other Fourth Circuit states, who had signed a petition protesting Sobeloff’s confirmation. He later wrote to Senators Sam Ervin and W. Kerr Scott of North Carolina, and Harry F. Byrd and A. Willis Robertson of Virginia to thank them for their ‘meritorious assistance’ in signing the petition.<sup>98</sup> Throughout their opposition to the nominee, both Johnston and Eastland had minimised their references to the segregation issue, but this did not prevent South Carolina’s unpredictable junior Senator, Strom Thurmond, from pointing out that Sobeloff was ‘a strong advocate of integration of races in the public schools.’<sup>99</sup>

Following his complaint that the Judiciary Committee had failed to make satisfactory investigations into Sobeloff’s background, Johnston’s motion to send the nomination back to Committee was defeated by a vote of 63-20. Although the nomination was confirmed by the Senate shortly afterwards, by a vote of 64-19 – with fifteen Southern Democrats joined in opposition by four Republicans – the senior Senator won praise from his home state.<sup>100</sup> State Senator L. Marion Gressette believed that Johnston’s fight against Sobeloff ‘was an excellent job and will in the long run prove most helpful to our cause,’ while former state Senator Huger Sinkler felt that ‘the fight demonstrated both to the country and to Sobeloff himself that we are seriously concerned over the progressive encroachment of the Federal Judiciary.’<sup>101</sup>

Reflecting on his year-long crusade to prevent Sobeloff from reaching the Fourth Circuit, Johnston wrote in a letter to attorney James H. Hammond that ‘without additional support in the final stages it proved impossible,’ but added

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<sup>96</sup> *Ibid.*, p.9.

<sup>97</sup> *Ibid.*, p.10.

<sup>98</sup> Letters from Olin D. Johnston to various, 16<sup>th</sup> July 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 4; ‘Sobeloff is Opposed’, *The New York Times*, 15<sup>th</sup> July 1956, p.42.

<sup>99</sup> ‘Two Senators Delay Sobeloff Confirmation’, *The Washington Post-Times Herald*, 28<sup>th</sup> July 1956, p.23.

<sup>100</sup> ‘Senate Confirms Sobeloff, 64 to 19’, *The New York Times*, 17<sup>th</sup> July 1956, p.1; Nichols, *A Matter of Justice*, p.87.

<sup>101</sup> Letter from L. Marion Gressette to Olin D. Johnston, 20<sup>th</sup> July 1956; letter from Huger Sinkler to Olin D. Johnston, 18<sup>th</sup> July 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 1.

that ‘possibly the fight against him, though, and the publicity given it, will make the people realise what his views are, and I sincerely hope that it may lead him toward the path of conservatism, although that seems unlikely.’<sup>102</sup> To Huger Sinkler, he declared, ‘it is good to know that my people realise the efforts extended in the Senate. As you know, people do not often take the time to write letters of commendation, and I therefore doubly appreciate your courtesy.’<sup>103</sup> In writing to acknowledge Johnston’s communication regarding the introduction of a new federal judgeship for South Carolina, Governor George Bell Timmerman Jr quipped, in his own handwriting at the bottom of the letter, ‘I hope Brownell doesn’t attempt to force a Marylander on us. GBT.’<sup>104</sup>

To fill the second vacancy on the Fourth Circuit, Strom Thurmond renewed his attempt to engineer the appointment of Robert Figg, but his efforts received no support from Olin Johnston, whose lack of enthusiasm for Figg was influenced by sour memories of Figg’s role as Thurmond’s speechwriter during the latter’s challenge to his incumbency in 1950.<sup>105</sup> Attorney General Herbert Brownell finally consented to the appointment of a South Carolinian judge in the form of Clement F. Haynsworth of Greenville.<sup>106</sup> The full significance of Haynsworth’s nomination to the Fourth Circuit – and the extent of his role in the story of South Carolina and the Supreme Court – will be analysed fully in Chapter Six.

Having established his credentials as a no-nonsense investigator of judicial nominees, Olin Johnston became the focus of the press following President Eisenhower’s selection of William J. Brennan to replace the outgoing Justice Sherman Minton on the Supreme Court. Despite calling for careful scrutiny of the nominee’s background, Johnston claimed that he was not planning to initiate a concerted opposition to Brennan on a scale similar to his crusade against Sobeloff,

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<sup>102</sup> Letter from Olin D. Johnston to James H. Hammond, 20<sup>th</sup> July 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 3.

<sup>103</sup> Letter from Olin D. Johnston to Huger Sinkler, 20<sup>th</sup> July 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 3.

<sup>104</sup> Letter from George Bell Timmerman to Olin D. Johnston, 18<sup>th</sup> July 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Judiciary Committee, General, Folder 1.

<sup>105</sup> Nichols, *A Matter of Justice*, p.88.

<sup>106</sup> Letter from Walter Brown to Strom Thurmond, 13<sup>th</sup> July 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1962, Box 19, 3 (United States Court and Supreme Court Judges), Folder 1; Nichols, *A Matter of Justice*, p.88; Peltason, *58 Lonely Men*, p.24.

maintaining simply that 'I just don't know anything about him one way or another ... but the Supreme Court is so important we should be very careful on all these nominations.'<sup>107</sup> The Brennan selection had resulted from Eisenhower's programmatic method of sourcing judicial nominees, which in this case demanded a conservative Democratic judge from the East Coast, preferably younger than sixty-two years of age.<sup>108</sup> With the upcoming Presidential Election in mind, Eisenhower was keen to target the Catholic vote by re-instating the 'Catholic seat' which had disappeared from the Court following the death of Justice Frank Murphy in 1949.<sup>109</sup>

For Johnston's supporters, Brennan's faith would become the most controversial aspect of his nomination, with one writer declaring 'never before in the history of our country have we been faced with such grave danger as there exists today ... I refer to ROMAN CATHOLICISM', and another, who wished to remain anonymous, citing Massachusetts Senator John F. Kennedy's unsuccessful campaign for the Democratic Vice Presidential nomination as an example of how 'the Roman Catholic church wants to control this country of ours, and make us slaves to the Pope.'<sup>110</sup> As with the anti-Semitic comments he had received during the summer, Johnston declined to dignify the anti-Catholic views of his supporters.

With the Sobeloff controversy having died down, Johnston's reluctance to unleash hell on the comparatively inoffensive Supreme Court nominations of William Brennan and Charles Evans Whittaker proved that the South Carolinian knew how to pick his battles. Senator Joseph McCarthy of Wisconsin, already a notorious figure for his communist 'witch-hunts', asked to appear before the Senate Judiciary Committee so that he could question Brennan at length on the

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<sup>107</sup> 'Case Asks No Delay In Brennan Okay', *Daytona Beach Morning Journal*, 20<sup>th</sup> November 1956, p.4; 'Brennan Check Urged', *The New York Times*, 20<sup>th</sup> November 1956, p.57; 'Sen. Johnston to Examine Justice Brennan's Record', *St. Petersburg Times*, 19<sup>th</sup> November 1956, p.2.

<sup>108</sup> Yalof, *Pursuit*, p.58.

<sup>109</sup> Perry, *A 'Representative' Supreme Court?*, p.40; Stephen J. Wermiel, 'The Nomination of Justice Brennan: Eisenhower's Mistake?', *Constitutional Commentary* 11 (1994-5), pp.515-537, p.533; Yalof, *Pursuit of Justices*, p.55-6.

<sup>110</sup> Letter from Clarence F. Anderson to Olin D. Johnston, 21<sup>st</sup> November 1956; letter from anonymous to Olin D. Johnston, 19<sup>th</sup> November 1956, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 60, Judiciary Committee, Appointments, Brennan, William J., Folder 101.

manner in which the nominee had supposedly ‘used the Supreme Court of New Jersey as a privileged sanctuary from which to ... conduct guerrilla warfare against anyone who would dare attempt to expose individual communists.’<sup>111</sup> The interrogation, which provoked tense exchanges with Chairman Eastland and also Senator O’Mahoney, failed to convince Senators of Brennan’s lack of suitability for the Court, and both Brennan and Whittaker were confirmed by unanimous voice vote on 19<sup>th</sup> March 1957.<sup>112</sup>

It may seem ironic that Johnston pursued a major battle to prevent Simon Sobeloff from reaching the Fourth Circuit Court of Appeals while showing little or no interest in the nomination to the Supreme Court of William Brennan, a man who would later prove to be one of the more uncompromising figures in the history of the Warren Court’s judicial activism. On the other hand, while Sobeloff’s role in ‘Brown II’ suggested a clear sympathy with the Supreme Court’s order to desegregate, there was little in Brennan’s judicial record to indicate that he would become one of the Court’s most consistent and influential liberal forces throughout the 1960s, 1970s and 1980s.<sup>113</sup> Furthermore, the fact that Brennan’s selection resulted partly from Eisenhower’s preference for filling Supreme Court vacancies with judges not known to him personally – in contrast to the choice of Sobeloff, whose role as Solicitor General had him marked as an Administration insider – might well have minimised suspicion of one nominee and increased suspicion of the other.<sup>114</sup> Few have contested Mark Silverstein’s claim that during the Eisenhower years, ‘the appointment of federal judges remained a low-key affair, with Senators typically unwilling or unable to invest substantial political capital in any attempt to challenge judicial nominations.’<sup>115</sup> But Johnston’s behaviour throughout the Sobeloff controversy suggests that the state of South Carolina does not conform to this narrative. As Chapter Three will illustrate, the

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<sup>111</sup> Excerpt from Congressional Record, 19<sup>th</sup> March 1957, Herman E. Talmadge Collection Subgroup C, Series 8: Legislation, Box 426, Folder 7.

<sup>112</sup> Excerpt from Congressional Record, 19<sup>th</sup> March 1957, Herman E. Talmadge Collection Subgroup C, Series 8: Legislation, Box 426, Folder 7.

<sup>113</sup> See Wermiel, ‘The Nomination of Justice Brennan’, for a thorough study of Brennan’s record prior to his nomination.

<sup>114</sup> Yalof, *Pursuit of Justices*, p.42-3.

<sup>115</sup> Mark Silverstein, *Judicious Choices: The Politics of Supreme Court Appointments* (London: Norton, 2004), p.31.



senior Senator's obstruction of Thurgood Marshall to the Second Circuit Court of Appeals further re-enforces the importance of research objective (6) in illustrating South Carolina's role in the intense politicisation of lower court, as well as Supreme Court, nominations.

With two new Justices joining Earl Warren and John Marshall Harlan on the bench, President Eisenhower appeared to be re-shaping the Supreme Court with remarkable speed. Yet the occurrence of two landmark events during 1957 would only increase the likelihood of Olin Johnston living up to his reputation as a formidable Southern presence on the Senate Judiciary Committee.

### **Mallory and Little Rock**

The bitterness of the 1950 Senate campaign in South Carolina lingered on in the partnership of the state's two Senators. Despite the cordial relations established in the late 1940s, when Johnston was the junior Senator and Thurmond served as Governor, the two men never developed a genuine friendship following the battle of 1950 and preferred to conduct their business separately whenever possible, but the relationship was characterised by a sense of mild antagonism rather than outright hostility. During the Senate elections of 1956, when both men were seeking re-election but running unopposed in the Democratic Party primaries in South Carolina, each ran a 'nuisance' candidate against the other in what *The Charleston News and Courier* described as 'a skirmish to determine which of the men will emerge as the state's number one political boss.'<sup>116</sup> Former Congresswoman Liz Patterson recalls that her father, Olin Johnston, 'would take people to the Senate dining room and Strom would come over and sit down and join them, and then Strom would leave and Daddy would pay the check for Strom and everyone. I do remember Daddy would really get sort of upset.'<sup>117</sup>

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<sup>116</sup> 'Will Johnston Or Thurmond Lead?', *The News and Courier*, 9 April 1956, p.8A; Jordan, *Primary State*, p.82.

<sup>117</sup> Interview with Elizabeth J. Patterson, 29<sup>th</sup> September 2014.

Regardless of any ill feeling one may have developed over being hoodwinked into paying for the other's dinner, Johnston and Thurmond remained united in their condemnation of the Supreme Court, particularly during the mid-to-late 1950s, when South Carolina's conservative political community responded to the *Brown* decision with discussions of 'interposition'. Essentially a doctrine of resistance deriving from James Madison's notion of each state retaining the right and duty to 'interpose' themselves between their citizens and the Federal Government in order to prevent unreasonable political interference, 'interposition' was resurrected by James J. Kilpatrick, editor of *The Richmond News Leader*, and became the subject of much coverage in the nation's press, particularly after Senator James Eastland's visit to South Carolina in January 1956.<sup>118</sup> During his address before the state's Association of Citizens' Councils, Eastland was joined onstage by, among others, Johnston and Thurmond, Governor George Bell Timmerman, state Senator Edgar A. Brown, and also Fritz Hollings, who had been elected Lieutenant Governor in 1954.<sup>119</sup>

The endorsement of interposition may have reassured the state's concerned white conservative voters but the involvement of Thurmond, and, to a lesser extent, Johnston, in the creation of the Southern Manifesto of 1956 suggested that both men saw sense in the insistence of Senator John Sparkman of Alabama that Democratic solidarity in the Senate remained the only realistic means of preventing the introduction of legislation which might compromise Southern state autonomy.<sup>120</sup> The manifesto condemned the Supreme Court while providing a clear Southern statement of opposition to the *Brown* ruling, reflecting the views of ninety-nine Democrats and two Republicans, including the entire congressional delegations of all five Deep South states (Louisiana, Mississippi, Alabama, Georgia and South Carolina) and also Arkansas and Virginia.<sup>121</sup> Richard

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<sup>118</sup> Crespino, *Strom Thurmond's America*, p.105; Newton, *Justice for All*, p.339-40.

<sup>119</sup> 'South Must Take Offensive In Race Fight, Eastland Says', *The News and Courier*, 27 January 1956, p.1; Badger, 'From Defiance', pp.127-143; p.46.

<sup>120</sup> Speech by Senator John Sparkman, Alabama Statewide Radio Hook-Up originating from Mobile, Alabama, 17<sup>th</sup> April 1950, Olin D. Johnston Collection, Senate Papers, Reference Files, Box 116, Civil Rights, 1950-56.

<sup>121</sup> Anthony J. Badger, 'Southerners Who Refused to Sign the Southern Manifesto', in Anthony J. Badger, *New Deal/New South: an Anthony J. Badger Reader* (Louisville: University of Arkansas Press, 2007), pp.72-87, p.72-3; Robert Mann, *When Freedom Would Triumph* (Baton Rouge, LA: Louisiana State University Press, 2007), p.19.

Russell's claim that Thurmond played a highly significant role in producing the document is further suggested by the South Carolinian's boisterous promotion of the manifesto among Senators, particularly his provocative, yet unsuccessful, attempt to goad racial moderate Senator Albert Gore of Tennessee to sign the document in front of reporters.<sup>122</sup>

Scholars of Southern politics have recognised the significance of the Southern Manifesto in the story of Thurmond's segregationist crusade against the Supreme Court, with Joseph Crespino claiming that the document 'initiated for Thurmond a war on the Warren Court that became the most consistent theme of his politics for the next decade and a half' and Tony Badger noting that Thurmond's aim 'was to stir up popular segregationist feeling by convincing wavering politicians and their constituents that the Supreme Court could, and should, be defied.'<sup>123</sup> Yet the simmering cynicism of Olin Johnston is generally overlooked, despite the fact that his position on the Judiciary Committee would become a powerful weapon in a lengthy anti-Supreme Court campaign, in which Thurmond was only one participant. Furthermore, the war of South Carolina on the Supreme Court would ultimately transcend the issue of segregation. Although Thurmond's comments on the Southern Manifesto – introduced on the Senate floor by Senator Walter F. George of Georgia on 12<sup>th</sup> March 1956 – included his familiar argument that 'the white people of the South are the greatest minority in this country', the struggle against the Court would in the coming years involve issues as diverse as the communist threat, crime and punishment, internal security and subversion, affirmative action, religion, obscenity and freedom of speech, all of which fuelled the efforts of Thurmond, Johnston and other conservative Senators to link the Southern reaction to *Brown* to their perception of a growing national reaction to the Supreme Court's judicial activism.<sup>124</sup>

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<sup>122</sup> Letter from Richard B. Russell to Hayes Mizell, 30<sup>th</sup> April 1962, Richard B. Russell Collection Subgroup C, Series 10: Civil Rights, Box 195, Folder 10; Badger, 'Southerners Who Refused to Sign', p.79-80; 'Senators Chart High Court Fight', *The New York Times*, 10<sup>th</sup> February 1956, p.10.

<sup>123</sup> Crespino, *Strom Thurmond's America*, p.108; Badger 'From Defiance', p.135.

<sup>124</sup> Address by Senator Strom Thurmond on a Declaration of Principles, in the United States Senate, 12<sup>th</sup> March 1956, p.6, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Addresses 1956, Box 4, Folder 53; Crespino, *Strom Thurmond's America*, p.107-8.

Throughout their crusade, they were frequently able to point to the stubborn pro-civil rights liberalism of Northern Senators as an excuse for their limited gains. This was particularly the case during 1958, when both Senators were advising their supporters to manage their expectations, with Johnston telling one resident from Hammond, Indiana that to pass a bill to introduce a constitutional amendment requires 'a two-thirds vote, which is the problem we Southern Senators have faced recently' and Thurmond complaining to a married couple from Chappells, South Carolina that 'I am afraid the odds will be more strongly against us in the new Congress.'<sup>125</sup>

Nonetheless, their 'nationwide' cause was awarded some degree of legitimacy in the many supportive letters sent to them by Americans outside the South, and was given a boost during the summer of 1958, when a conference of state Chief Justices – of which the Deep South was represented only by Judge Taylor H. Stukes of South Carolina – introduced a resolution urging the Supreme Court to exercise judicial restraint in matters relating to federalism.<sup>126</sup> In their report, the Chief Justices echoed the view of Olin Johnston that 'there seems to be a tendency for the Supreme Court to get into the legislative field' by declaring that 'we are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers.'<sup>127</sup>

Thurmond's enthusiasm over the Southern Manifesto had been channelled on behalf of the entire Southern delegation, but his behaviour during the debate over the Civil Rights Act of 1957 was for many, not least the leader of the Senate's Southern bloc, Richard Russell, an example of the South Carolinian's willingness to

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<sup>125</sup> Letter from Olin D. Johnston to Jay E. Darlington, 20<sup>th</sup> October 1958, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 65, Judiciary Committee, General, Appointments; Letter from Strom Thurmond to Mr and Mrs R. Victor Brannon, 1<sup>st</sup> December 1958, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1958, Box 7, Folder 4-1 (Supreme Court), July 3-December 31, 1958.

<sup>126</sup> See, for example, letter from Ewing E. Clemons to Olin D. Johnston, 23<sup>rd</sup> October 1957; Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 60, Judiciary Committee, Appointments, Haynsworth, Clement F., Folder 103; letter from Stanley Walling to Olin D Johnston, 4<sup>th</sup> September 1959, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 70, Civil Rights, Reaction to ODJ Speech, Folder 2; John R. Schmidhauser, *The Supreme Court and Congress* (Austin, TX: Holt, Rinehart and Winston, 1961), p.149.

<sup>127</sup> Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions, August 1958, Conference of Chief Justices, 1313 East Sixtieth Street, Chicago 37, Illinois, Herman E. Talmadge Collection Subgroup C, Series 3: Civil Rights, Box 17, Folder 4; 'Hearing On Two Judicial Appointees Tones Down "Oath" To A Question', *The Washington Post-Times Herald*, 22<sup>nd</sup> April 1958, p.A8.

use the race issue to further raise his public profile. Despite agreeing with fellow Southerners that a filibuster would be unwise, Thurmond informed his constituents that he was 'prepared to speak at great length and to the full extent of my physical capacity when the bill is brought before the Senate for consideration.'<sup>128</sup> In the event, Thurmond set a record, which remains unbroken, by speaking against passage of the Act for twenty-four hours and eighteen minutes on 28<sup>th</sup> and 29<sup>th</sup> August 1957.<sup>129</sup> Fellow Southern Senators, many of whom were insisting on the need to maintain solidarity after the damage done by Thurmond's divisive 'Dixiecrat' presidential run in 1948, were outraged.<sup>130</sup> Russell, who feared that Thurmond's antics would compromise his negotiations over the bill with President Eisenhower, slammed the South Carolinian for pursuing 'personal political aggrandisement', to which Thurmond remained indignant, arguing that 'each Senator individually was free to fight the bill as he chose'.<sup>131</sup>

With the battle over the Civil Rights Act raging on in the Senate, two landmark events from 1957 would escalate South Carolina's war on the Supreme Court. On 24<sup>th</sup> June, the Court handed down its decision in *Mallory v. United States*, which involved the conviction and death sentence of black South Carolinian Andrew R. Mallory for the rape and assault of a white woman. Finding that he had been arrested without probable cause and then interrogated for hours on end prior to arraignment, the Court overturned Mallory's conviction, despite the existence of an apparently voluntary confession, and he walked free.<sup>132</sup> Thurmond employed a predictable choice of words to illustrate his disgust over the decision, arguing that 'the Supreme Court shows more concern for the rights of communists and criminals, including rapists and murderers, than it does for the protection of the innocent American citizens', yet these and other remarks

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<sup>128</sup> Letter from Strom Thurmond to J.R. McVicker, 8<sup>th</sup> July 1957, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1957, Box 27, Supreme Court July 3-13, 1957.

<sup>129</sup> Crespino, *Strom Thurmond's America*, p.114-5.

<sup>130</sup> See, for example, letter from Richard B. Russell to Olin D. Johnston, 7<sup>th</sup> June 1949; letter from Olin D. Johnston to Richard B. Russell, 9<sup>th</sup> June 1949, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 17, Civil Rights.

<sup>131</sup> 'Won't Use Act To Punish Dixie, Ike Tells Russell', *The Washington Post-Times Herald*, 11<sup>th</sup> July 1957, pA1; 'Russell Leads Attack on Thurmond', *The Augusta Chronicle*, 31<sup>st</sup> August 1957, p.1, Strom Thurmond Collection, Legislative Assistant Series, Mss.0100.15, Box 140, Richard Russell, August 1957-May 1964.

<sup>132</sup> Crespino, *Strom Thurmond's America*, p.108.

expressed during the summer of 1957 formed only the tip of the iceberg with regard to the Senator's personal interest in this case.<sup>133</sup>

As a frequent re-offender, Andrew Mallory would unwittingly provide Strom Thurmond with years of future opportunities to condemn the liberal judicial activism of the Supreme Court. The following year, he read to the members of the Senate an editorial in *The Washington Evening Star*, which reported that police were again hunting Mallory on suspicion of housebreaking and assault.<sup>134</sup> The same year, a so-called 'anti-Mallory' bill was passed by the House of Representatives, essentially as a means of allowing evidence to be entered even when obtained during a delay of arraignment, but this was stalled in the Senate.<sup>135</sup> By the end of April 1960, when Mallory was facing a new trial for rape and burglary charges, the Southern fury over the Court's original decision to set him free now included Senators Sam Ervin of North Carolina, Harry F. Byrd of Virginia and Olin Johnston of South Carolina, who collaborated in the introduction of legislation to permit trial judges to determine whether a confession was truly voluntary, in a decision which would be binding in any future process of judicial review.<sup>136</sup> The ongoing controversy over the Supreme Court's consideration of criminal justice cases only fuelled Strom Thurmond's rage, and his attempt to use *Mallory v. United States* as one of the more potent weapons in his interrogation of Supreme Court nominee Abe Fortas, covered in Chapter Five, would once again emphasise the importance of Andrew Mallory in the story of South Carolina and the Supreme Court.

The second key event from 1957 that intensified the war on the Court was the decision of President Eisenhower to use federal troops to remove Little Rock Central High School from the hands of Arkansas Governor Orval Faubus, who was

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<sup>133</sup> Statement by Senator Strom Thurmond in the Senate with reference to the Supreme Court decision in the *Mallory* case, 27<sup>th</sup> June 1957, p.3, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Statements on Senate Floor 1957, Box 5, Folder 73.

<sup>134</sup> Statement by Senator Strom Thurmond on *Mallory* decision and *Star* Editorial, 9<sup>th</sup> January 1958, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Statements on Senate Floor 1958, Box 8, Folder 84.

<sup>135</sup> Irving Dilliard, 'Thomas C. Hennings jr and the Supreme Court', *Missouri Law Review* 26:4 (1961), pp.429-440, p.432; Stephen M. Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power* (Cambridge: Cambridge University Press, 2011), p.296.

<sup>136</sup> '4 Democrats Offer Bill on Confessions', *The New York Times*, 26<sup>th</sup> April 1960, p.13.

using the National Guard to prevent the enrolment of nine African American students. Eisenhower's dramatic gesture, which confirmed his willingness to ensure the integration of Southern schools through implementation of *Brown*, was met with a chorus of condemnation from Deep South politicians. After urging Governor Faubus to 'proclaim a state of insurrection', an appalled Olin Johnston declared in a letter to Leroy Collins, Governor of Florida, that 'it is impossible for me to fully express my concern over the action taken by President Eisenhower to use brute force and troops armed with bayonets and guns at Little Rock.'<sup>137</sup> Johnston's insistence that the Supreme Court was failing to protect the United States from communism was evident in his remarks in the Senate, not least when he declared, 'Mr President, one wonders when the gentlemen of the high court will have a rendezvous with reality and recognise the communistic conspiracy in America for what it is: a clear and present danger. I recommend to the membership of the Supreme Court that no matter how heavy their workload, no matter how pressing the demands of their judicial duties, that they take time out and read and ponder and reflect on the contents of Mr J. Edgar Hoover's bestseller, *Masters of Deceit: The Story of Communism in America and How to Fight It*.'<sup>138</sup>

The outrage over Little Rock served to prolong the delay over W. Wilson White's appointment as head of the Justice Department's new Civil Rights Division, a post created by the 1957 Civil Rights Act, which would empower White to ensure the enforcement of voting rights. In outlining his opposition to White's appointment, Strom Thurmond complained that, as Assistant Attorney General, the nominee had advised President Eisenhower to send federal troops to Arkansas, claiming that 'Mr White is known in the South as one of those who badly bungled the affair in Little Rock. I do not understand how the Administration can believe that a man of this reputation will be able to inspire confidence and

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<sup>137</sup> Letter from Olin D. Johnston to Leroy Collins, 27<sup>th</sup> September 1957, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 60, Judiciary Committee, NAACP, Folder 107A.

<sup>138</sup> John E. Huss, *Senator for the South: A Biography of Olin D. Johnston* (New York, NY: Doubleday, 1961), p.207.

respect with the Southern people in his work.’<sup>139</sup> Observing that White’s appointment had remained unconfirmed for eight months, Richard Lyons commented in *The Washington Post-Times Herald* that ‘the Southerners ... have put their views on the record again for the folks back home.’<sup>140</sup>

The remarkable intervention in the Little Rock integration crisis, combined with the grossly unpopular *Mallory* decision, served to remind Southern Democratic Senators of their disgust following the announcement of *Brown* in May 1954. The decision of the Justices in September 1958 to reject the on-going delay in the desegregation of Little Rock’s schools underlined the sharp ideological divide between North and South in the US Senate. Thurmond claimed that ‘no-one will rejoice more from this decision than Nikita S. Khrushchev and his cohorts’, while Senators Jacob K. Javits of New York and Clifford P. Case of New Jersey praised the ruling, with Case arguing that the Court had ‘admirably restated the settled doctrine that interpretations of the Constitution by the Supreme Court are the supreme law of the land.’<sup>141</sup> For Southern Senators, President Eisenhower’s actions during the Little Rock affair suggested that the Supreme Court’s apparent crusade to destroy the Southern way of life by outlawing segregation in public places was now unstoppable.

With conservative white voters handing out ‘Impeach Earl Warren’ leaflets all over the South, the region’s Senators stepped up their efforts to investigate the Supreme Court in the hope of finding information which could be used to discredit the individual Justices and also the NAACP.<sup>142</sup> Richard Russell requested a complete breakdown of Thurgood Marshall’s record of cases before the Court, while his fellow Georgian, Herman Talmadge, compiled biographical details of all Justices serving as of May 1958, noting that five of them had never served on a

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<sup>139</sup> Statement by Senator Strom Thurmond in opposition to the confirmation of W. Wilson White as Assistant Attorney General for Civil Rights Division, on Senate floor, 13<sup>th</sup> August 1958, p.3-4, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Statements on Senate Floor 1958, Box 8, Folder 85.

<sup>140</sup> ‘Southerners Hold Up Vote On White’s Rights Job’, *The Washington Post and Times Herald*, 7<sup>th</sup> August 1958, p.A16.

<sup>141</sup> ‘Senators Assail And Praise Court’, *The New York Times*, 30<sup>th</sup> September 1958, p.22.

<sup>142</sup> ‘Wanted! Earl Warren For Impeachment For giving aid and comfort to the Communist Conspiracy, the mortal Enemy of the United States and the American People!’, leaflet, September 1957, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Year 1957, Box 27, Supreme Court July 15-December 19, 1957.



state Supreme Court or a US Court of Appeals.<sup>143</sup> Talmadge's curiosity even extended to enquiries into the origins of Earl Warren's family name, whereby he was informed that the Chief Justice's father, whose surname was originally Varran, came to the USA as an infant from Stavanger, Norway.<sup>144</sup>

The condemnatory Southern rhetoric would escalate throughout 1957 and 1958: having called for the impeachment of Supreme Court Justices who had 'curtailed the anti-communist campaigns of Congress', Thurmond called for 'total and unrelenting war on the Supreme Court's unconstitutional usurpations and unlawful arrogations of power' in a speech before the Citizens' Committee for Constitutional Government in Augusta, Georgia, adding that 'the federal government does not have enough troops to police the entire South, and even if it did, race mixing still could not be forced upon a determined, organised and united people.'<sup>145</sup> The outrage of his South Carolina colleague was just as evident, with Johnston pressing for passage of a new bill requiring the Senate to re-confirm all Supreme Court Justices every four years, and warning, in a manner which recalled his reservations over John Marshall Harlan, that 'unless the Supreme Court is halted on its infamous road, some day it will rule that United States law and our beloved Constitution and Bill of Rights will be subservient to some United Nations agreement or rule.'<sup>146</sup>

With a growing number of Senators becoming convinced that the Supreme Court was ignoring the Constitution by pursuing judicial activism, the late 1950s saw an increase in the number of bills being introduced in the Senate to curb the power of the Justices. For South Carolina's Senators, this was nothing new, as they had been attempting to restrict the jurisdiction of the Supreme Court since 1955. One of their early attempts, essentially a means of preventing the enforcement of

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<sup>143</sup> Letter from Louis L. Loeb to Richard B. Russell, 15<sup>th</sup> October 1957, Richard B. Russell Collection Subgroup C, Series 3: Speech/Media, Box 27, Folder 9; letter from Roland A. Ouellette to Herman Talmadge, 8<sup>th</sup> May 1958 and handwritten notes, Herman E. Talmadge Collection Subgroup C, Series 3: Civil Rights, Box 8, Folder 18.

<sup>144</sup> Letter from Ernest S. Griffith to Herman Talmadge, 10<sup>th</sup> June 1958, Herman E. Talmadge Collection Subgroup C, Series 3: Civil Rights, Box 8, Folder 18.

<sup>145</sup> 'Impeach Justices, Thurmond Urges', *The New York Times*, 8<sup>th</sup> July 1957, p.15; Crespino, *Strom Thurmond's America*, p.109-110.

<sup>146</sup> 'Heat Raised In Senate Debate On Court', *The Washington Post-Times Herald*, 27 June 1957, p.A2; Huss, *Senator*, p.207-8.

*Brown*, involved a bill which would give final authority in school segregation cases to the district courts. These and other efforts were criticised by supporters of civil rights such as Senator Paul Douglas of Illinois, who claimed that Johnston and Thurmond 'want to make the Senate a Super Supreme Court to override the language of the Fourteenth Amendment that equal protection shall be granted under the law to all citizens.'<sup>147</sup> The Jenner-Butler bill, originally introduced in July 1957 by Republican Senator William Jenner of Indiana, provided the first realistic opportunity for South Carolina to get behind a comprehensive effort to reform the power of the Supreme Court. The bill was favoured across the Senate, bringing together Southern segregationists and conservative Northern Senators concerned with communist subversion.<sup>148</sup> At the same time, Southerners supported a House Resolution known only as 'HR3', introduced as a 'pure states' rights' measure which civil rights advocates feared would allow Southern Bar Associations to disbar attorneys accepting race-related cases.<sup>149</sup> As Stephen Engel has argued, the passage in the House of the aforementioned 'anti-Mallory' bill only encouraged Southerners to pursue further legislative initiatives aimed at the Supreme Court.<sup>150</sup>

Under pressure from Thurmond, who threatened to attach the more aggressive HR3 to every remaining bill on the calendar unless a vote was allowed on the Jenner-Butler bill, Majority Leader Lyndon Johnson agreed to bring the bill before the Senate following the Judiciary Committee's favourable vote of 10-5.<sup>151</sup> The cunning Texan allowed Jenner to attach his legislation to another bill dealing with federal appellate procedure, safe in the knowledge that he had enough votes to defeat the latter bill. In the event, the Jenner-Butler bill failed by a vote of 49-41.<sup>152</sup> Shortly afterwards, Johnson was forced to adjourn the Senate to prevent passage of HR3 and managed to convince a sufficient number of Senators to vote

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<sup>147</sup> 'S.C. Senators Seek Court Power Limits', *The News and Courier*, 10<sup>th</sup> February 1955, p.1; 'State Segregation Bills Attacked By Senator', *Sarasota Herald-Tribune*, 11<sup>th</sup> February 1955, p.3.

<sup>148</sup> Engel, *American Politicians*, p.297.

<sup>149</sup> Robert Mann, *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights* (Orlando, FL: Harcourt Brace and co, 1996), p.231-2.

<sup>150</sup> Engel, *American Politicians*, p.298.

<sup>151</sup> 'Senate Group Votes Curbs on High Court', *The Washington Post-Times Herald*, 1<sup>st</sup> May 1958, p.A1.

<sup>152</sup> Engel, *American Politicians*, p.298.

to return the bill to the Judiciary Committee the following day (by a vote of 41-40), thus blocking its passage.<sup>153</sup>

Despite Johnson's success in defeating this legislation through his mastery of the Senate, the wide support for the Jenner-Butler bill and the near-passage of the notorious HR3 provided the first strong indication that the liberalism of the Justices of the Supreme Court now constituted a national concern – a claim which Johnston and Thurmond had been making for years. The war which began in a Charleston courtroom in 1951, when Thurgood Marshall had argued against the segregation of schools in Clarendon County, had now been played out in the US Senate for half a decade, during which the South Carolina Senators, through dogged determination, had contributed to a serious court-curbing agenda to the point where the South had very nearly succeeded in denting the awesome judicial power of the United States Supreme Court. By the beginning of John F. Kennedy's Presidency in January 1961, Southern conservatives were chairing nine of the fifteen Standing Committees in the US Senate.<sup>154</sup> With neither death nor retirement a likely prospect for any of the ageing Chairmen, Lyndon Johnson, who became Kennedy's Vice President, was reported to have told Senate liberals that a desperate ploy of 'killing off' a number of elderly Southerners remained their only hope of introducing a new civil rights bill.<sup>155</sup>

### **The Stewart Hearings**

By the beginning of 1959, both President Eisenhower and Chief Justice Warren were beginning to feel the strain in the continued Southern onslaught that had begun with *Brown v. Board of Education* almost five years earlier. In February, the President gave a clear indication of his antipathy toward South Carolina's Senators

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<sup>153</sup> Mann, *Walls of Jericho*, p.233-4.

<sup>154</sup> 'A Group with Real Power', *US News and World Report*, 21<sup>st</sup> March 1961, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>155</sup> 'Wear Down South, LBJ Says of Rights', *The Atlanta Journal*, 18<sup>th</sup> June 1963; Strom Thurmond Collection, Legislative Assistant Series, Mss.0100.15, Box 140, Lyndon Johnson, July 1957-October 1966.

in a letter to Ralph McGill, editor of *The Atlanta Constitution*, in which he referred to Olin Johnston and Strom Thurmond as being 'so entrenched in the prejudices and racial antagonism that they never show so much as a glimmer of readiness to see the other side of the problem.'<sup>156</sup> The same month, Earl Warren tendered his resignation from the American Bar Association (ABA) in protest at the Association's criticism of the Supreme Court, and a perceived failure to back the Court in the war over *Brown*.<sup>157</sup>

Despite the President's resentment of Johnston and Thurmond, there is evidence that the obstruction of Southern Senators had become a significant influence in Eisenhower's selection process for Supreme Court Justices. In a letter to his new Attorney General, William P. Rogers, Eisenhower sounded sceptical of Rogers's recommendation of his predecessor, Herbert Brownell, as a replacement for outgoing Justice Harold Hitz Burton, on the grounds that Southerners 'would point out that [Brownell] was Attorney General when the Supreme Court's integration orders conforming to the decision of 1954 were promulgated.'<sup>158</sup> If David A. Nichols is correct that Eisenhower and Brownell were 'grooming' Simon Sobeloff for a seat on the high court in 1956, the President's comment to Rogers regarding Brownell suggests that Eisenhower had almost certainly re-considered this move in the wake of Johnston's crusade against Sobeloff, and also the Little Rock crisis.<sup>159</sup> Conscious of the fact that Hugo Black was the only remaining Southern Justice on the Court by the summer of 1958, the President added the name of Judge Elbert Tuttle, of the Fifth Circuit Court of Appeals, to the shortlist of candidates, in addition to Kenneth Royall, who had served as Harry Truman's Secretary of the Army, in that 'he, too, is of Southern origin.' Ultimately, Eisenhower decided against both Southern candidates: Tuttle's support for *Brown* would have proved fatal if he were nominated, while Royall was passed over because 'he is a Democrat and I do not want to further overbalance the Court as

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<sup>156</sup> Nichols, *A Matter of Justice*, p.240.

<sup>157</sup> Newton, *Justice for All*, p.356-7.

<sup>158</sup> Letter from Dwight D. Eisenhower to William P. Rogers, 17<sup>th</sup> September 1958, William P. Rogers Papers, Series I: General Correspondence, 1952-61, Box 4.

<sup>159</sup> Nichols, *A Matter of Justice*, p.86.

between the two major parties.<sup>160</sup> The President settled on the selection of Judge Potter Stewart, of the Sixth Circuit Court of Appeals, who, like the outgoing Justice Burton, was from the state of Ohio.

By the time that Stewart was officially nominated, he had been serving on the Supreme Court on a recess appointment for three months, a situation that, according to *The Philadelphia Inquirer*, caused concern among Northern and Southern Senators that 'Mr Eisenhower had robbed the Senate of some of its control over the nomination.'<sup>161</sup> One particularly unhappy Northerner was freshman Senator Philip A. Hart of Michigan, who complained that recess appointments 'hamper the Senate in performing its constitutional duty of confirmation' in the sense that a Supreme Court nominee who has already served for several months can always argue that his service prevents him from answering questions relating to his judicial positions on issues currently before the Court.<sup>162</sup> Hart, who would later introduce a Senate resolution to discourage the use of recess appointments to the Supreme Court, also observed that the presidential practice of placing individuals in office months before the Senate is able to scrutinise and confirm them 'had not been used for more than a century until Mr Eisenhower named Earl Warren as Chief Justice in 1953.'<sup>163</sup>

Southern Democrats, led by Richard Russell, were only too happy to emphasise the recess appointment controversy, if only as a means of demonstrating that their concerns over Stewart's views on segregation did not constitute the sole reason for their opposition. Nonetheless, Southern Senators began discussing the segregation issue far more openly than before. While Chairman Eastland expressed doubts that Stewart would offer fair rulings on 'the greatest domestic question before the country today: racial integration,' Russell complained that the nomination was part of a Justice Department scheme to

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<sup>160</sup> Letter from Dwight D. Eisenhower to William P. Rogers, 17<sup>th</sup> September 1958, William P. Rogers Papers, Series I: General Correspondence, 1952-61, Box 4.

<sup>161</sup> 'Stewart OKd For High Court By Senate', 70-17, *The Philadelphia Inquirer*, 6<sup>th</sup> May 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

<sup>162</sup> 'Senate Confirms Justice Stewart', *The New York Times*, 6<sup>th</sup> May 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

<sup>163</sup> 'Stewart OKd For High Court By Senate', 70-17, *The Philadelphia Inquirer*, 6<sup>th</sup> May 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

‘perpetuate some recent decisions of the Court in segregation rulings, which were partly based on *amicus curiae* briefs submitted by the Justice Department.’<sup>164</sup> The Georgian offered little in the way of evidence, but, as both Michael Kahn and David A. Nichols have argued, Eisenhower remained committed to the appointment of judges who would support desegregation, and, in the process, constructed ‘a judicial edifice that would withstand Southern and conservative efforts to undermine *Brown v. Board of Education*.’<sup>165</sup> This theory is further supported by remarks made by Stewart himself during his confirmation hearings: when asked for his views on the *Brown* ruling, he declared, ‘I would not like you to vote for me on the assumption ... that I am dedicated to overturning that decision. Because I am not.’<sup>166</sup>

The Stewart confirmation hearings proved to be a landmark event, firstly, because of the willingness of Southern Senators, five years on from the announcement of *Brown*, to discuss the segregation issue openly during deliberations over nominations to the Supreme Court. Olin Johnston provided an example early on during the hearings:

**Senator Johnston** (South Carolina): Let us get down to the question in my state, the public school question there. In what way was it changed in 1954 – the law – in what way was it changed? How was the Constitution changed? The interpretation of what the Constitution meant?

**Mr Stewart:** Well, as I understand that decision – as I understand that decision, it held that it was a denial of equal protection of the laws for a state in the public school system to discriminate against school children exclusively on the basis of race. To my knowledge – I may be mistaken – there never has been a decision of the Supreme Court of the United States contrary to that. I don’t know that I agree that the Constitution was changed by that decision.<sup>167</sup>

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<sup>164</sup> Nichols, *A Matter of Justice*, p.82-3; ‘Stewart Is Confirmed On Job Since October’, *The Washington Evening Star*, 6<sup>th</sup> May 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

<sup>165</sup> Kahn, ‘Shattering the Myth’, p.48; p.51; Nichols, *A Matter of Justice*, p.82.

<sup>166</sup> ‘Senate Confirms Justice Stewart’, *The New York Times*, 6<sup>th</sup> May 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

<sup>167</sup> The United States Senate, Report of Proceedings, Hearings Held Before Committee on the Judiciary, Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States, 9<sup>th</sup> April 1959, p.28.

Secondly, with Stewart continuing to respond carefully and awkwardly to questions on the same subject offered by Senator John McClellan of Arkansas, the hearings took a bizarre and confrontational turn. Senator Thomas C. Hennings of Missouri raised a point of order, claiming ‘I do not think it proper to inquire of a nominee for this court or any other his opinion as to any of the decisions or the reasoning upon decisions which have heretofore been handed down by that court.’<sup>168</sup> When Chairman Eastland suggested that Hennings was attempting to ‘gag’ members of the Committee, the hearings descended into chaos, with a North-South stand-off emerging quickly and dramatically:

**Senator Hennings:** Mr Chairman, I did not use the word “gag”.

**The Chairman:** All right. It means that the Committee is censoring Senator McClellan in denying him the right to ask a question that he thinks is necessary in order for him to ascertain how to officially act in this matter.

**Senator Hennings:** I did not interrupt him.

**The Chairman:** You did not interrupt. If the Committee says he can’t ask such a question, if it so rules, of course, he is –

**Senator Hennings:** May I complete my statement?

**Senator O’Mahoney:** Will the Senator from Missouri yield to me?

**Senator Hennings:** Please, I do not believe, Mr Chairman, that the word “gag” is an appropriate one.

**The Chairman:** All right.

**Senator Hennings:** Many, many questions have been asked by members of the Committee of the gentleman who presented himself here – many proper questions. I do not believe it is gagging, as the Chair is pleased to use the word, when a court overrules a question in a trial. That is not gagging counsel.

**The Chairman:** I know, but I don’t think that you can –

**Senator Hennings:** I believe this Committee is proceeding in a lawyer-like fashion.

**The Chairman:** If this Justice decides that the question is improper he can decide that.<sup>169</sup>

While the controversial nominations of the 1960s and beyond, covered in future chapters, often showcased a confrontation between a Senator and a nominee, the Stewart hearings were unique for the manner in which the nominee

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<sup>168</sup> *Ibid.*, p.41.

<sup>169</sup> *Ibid.*, p.46.

sat patiently and waited while members of the Committee argued amongst themselves throughout a dispute which reportedly lasted for an hour, and very nearly had to be settled by a roll call vote proposed by Senator William Langer.<sup>170</sup> Although one of the less distinguished moments in the history of Supreme Court confirmation hearings, Hennings's point of order was, for LA Scott Powe, a watershed moment in the history of Senatorial interrogation of nominees on their constitutional positions, in that the Supreme Court's dramatically increasing significance in American life was now beginning to demand a more intense form of scrutiny from the Judiciary Committee.<sup>171</sup> With Southerners now prepared to discuss *Brown* openly during confirmation hearings, future confrontations over Supreme Court nominations became inevitable, as Chapters Four, Five and Six will illustrate.

James Eastland delayed the Committee's consideration of the Stewart nomination long enough for Johnston to compile a 12-page report that condemned the practice of recess appointments. As *The Washington Post-Times Herald* noted, it was not until the final sentence of the report that Senators opposed Stewart personally on the grounds that the nominee 'thinks the Supreme Court has the power to legislate and to amend the Constitution of the United States.'<sup>172</sup> Following Committee approval by a vote of 12-3, Stewart was confirmed by a vote of 70-17, with the opposition consisting of all Senators from the states of Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia, joined by Senator Spessard Holland of Florida.<sup>173</sup> Strom Thurmond spoke for many in the Southern bloc by speculating that Stewart would be 'an improvement over the other occupants of seats on the Supreme bench; but when I make that statement, I must add that, in my opinion, he would

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<sup>170</sup> Unknown headline, *The Washington Post-Times Herald*, 10<sup>th</sup> April 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

<sup>171</sup> L.A. Scott Powe, 'The Senate and the Court: Questioning a Nominee', *Texas Law Review* 54 (1975-6), pp.891-902; p.898.

<sup>172</sup> Unknown headline, *The Washington Post-Times Herald*, 30<sup>th</sup> April 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

<sup>173</sup> 'Roll Call Vote in Senate on Stewart Nomination', *The New York Times*, 6<sup>th</sup> May 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.



not have to be too good a lawyer to be an improvement.’<sup>174</sup> Despite Philip Hart’s agreement with Southerners on the recess appointment issue, the Michigander ultimately voted to confirm, as did the moderate Estes Kefauver of Tennessee.<sup>175</sup> While the court-curbing bills and the issue of recess appointments had temporarily united Senators from all regions, the Stewart hearings provided a stark reminder that *Brown v. Board of Education* would remain a powerful source of intense disagreement between North and South. Thanks in no small part to the Southern influence on the Senate Judiciary Committee, the confrontational era of the Senate’s consideration of Supreme Court nominations had arrived.

### **The Old Frontier**

For most of the 1950s, the war of South Carolina’s Senators on the US Supreme Court differed little from the war waged by most other Deep South Democrats on the very same target. With all Southern states showcasing a strong interest in reducing the power of the Justices in order to preserve their regional autonomy, Johnston and Thurmond formed only part of a collective Southern anti-Court crusade to assure the folks back home of an unwavering support for the maintenance of racial segregation. Although it would not be until the 1960s that the South Carolina Senators would truly stand out in the conflicts over judicial nominations, it is clear from Johnston’s crusade against Simon Sobeloff and Thurmond’s determination to talk himself hoarse when opposing the Civil Rights Act that the South Carolinian trait of resistance outlined in the Introduction was alive and well during the decade covered in this chapter. With the Sobeloff opposition, Johnston provided an indication of his later crusade to block the nomination of Thurgood Marshall to the Second Circuit Court of Appeals, covered

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<sup>174</sup> Statement of Senator Strom Thurmond on Senate floor Opposing Confirmation of Potter Stewart to be an Associate Justice of the United States Supreme Court, 5<sup>th</sup> May 1959; Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Statements on Senate Floor, Box 8, Folder 93.

<sup>175</sup> ‘Stewart Is Confirmed On Job Since October, *The Washington Evening Star*, 6<sup>th</sup> May 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

in Chapter Three, while the passion, provocation and stamina displayed by Thurmond in pushing the Southern Manifesto and fighting the Civil Rights Act would be evident once again in his determined opposition to the Supreme Court nomination of Abe Fortas, covered in Chapter Five.

Despite their willingness to work together in a co-ordinated agenda of obstructionism, the South Carolina Senators' attack on the Supreme Court nominees of the 1950s was, as with the attack of the other Southern states, limited by a watering down of segregationist rhetoric in order to build a formidable coalition and avoid Northern dismissal of Southern interests. More often than not, the need to establish further criticism would lead to accusations of a lack of judicial experience, which became relevant in the case of John Marshall Harlan, or a lack of 'etiquette' on the part of Eisenhower in making his appointments, which became a critical issue with both Simon Sobeloff and Potter Stewart. The insistence of Johnston, Thurmond and other Southerners that the Supreme Court, under Earl Warren's leadership, was facilitating communist subversion became a powerful weapon in the fight over the court-curbing bills introduced throughout this era, which came close to compromising the Supreme Court's power in the summer of 1958.

Deep South Democrat Senators appeared to have achieved very little in using their powers of advice and consent in the nomination process for Supreme Court Justices during the 1950s. They failed to engineer any rejections, and their obstructionism failed to convince Eisenhower to select Supreme Court nominees considered acceptable to the South. Eisenhower's commitment to naming Justices who would uphold the 1954 decision was painfully clear during John McClellan's questioning of Potter Stewart over *Brown*. As *The Washington Post-Times Herald* reported, 'Stewart said that coming from Ohio, he had not been "shocked" by the decision.'<sup>176</sup>

On the other hand, it would be inaccurate to conclude that South Carolina's crusade was entirely without success during this decade, for two

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<sup>176</sup> Unknown headline, *The Washington Post-Times Herald*, 10<sup>th</sup> April 1959, William P. Rogers Papers, Series VII: Scrapbook, 1938-61, Box 66, Folder 3.

important reasons. Firstly, the insistence of Johnston and Thurmond that the Supreme Court posed a national, rather than regional, threat to American interests appeared to gain legitimacy before the end of the decade, with Northern Senators collaborating with the Southern bloc in supporting court-curbing bills, and also in joining their criticism of Eisenhower's recess appointments. Secondly, although the Administration, the press, and Senators from Northern states remained unconvinced by the arguments of Southerners that their obstruction in the nomination process was not due solely to an interest in the segregation issue, it remains the case that Johnston and Thurmond were able to create a comprehensive anti-Supreme Court agenda during the 1950s, which would influence the emergence of the highly politicised Supreme Court nomination process during the following decade. Their strategy of linking the Court's power to concerns over states' rights, US sovereignty and communism would be expanded over the next decade, to include, as future chapters will explain, crime and punishment, prayer in schools, legislative apportionment, obscenity, voting rights and freedom of speech. This greatly-expanded range of political issues would give further potency to the continued Southern complaints over the Justices' lack of judicial experience, and their continued criticism of the Court for not following the 'strict constructionist' doctrine of applying only the actual words of the Constitution in line with their original meaning, as intended when drafted by the nation's Founding Fathers. Although Eisenhower refused to nominate judges who would endanger the survival of *Brown*, his consideration of John J. Parker, John W. Davis, Elbert Tuttle and Kenneth Royall, and his agreement to appoint Clement Haynsworth to the Fourth Circuit Court of Appeals, suggests that the President was forced to acknowledge and tolerate the pressure from Southern Democrats to name judges with judicial philosophies which would accommodate the segregationist agenda. As Chapter Three will show, the judicial nominations of his Democratic successor, John F. Kennedy, were also made in the shadow of the Southern segregationist influence.

The issue of race would remain at the heart of South Carolinian obstruction to future nominees to the Judiciary. Thurgood Marshall's nomination to the Second Circuit, and later, his nomination to the Supreme Court, would prove a far bigger threat to South Carolina's Senators than any of the judicial appointments made during the 1950s. Potter Stewart's success in facing down Dixie suggested that increasing demands were being placed on Supreme Court nominees during the era of civil rights, but, as Chapters Three and Four will illustrate, the Stewart hearings ultimately gave little indication of the lengths to which Olin Johnston, Strom Thurmond and, later, Senator Ernest 'Fritz' Hollings, were prepared to go in defending the Southern – and South Carolinian – way of life.

## **CHAPTER THREE:**

### **Thurgood Marshall Faces Down Dixie**

*When historians of the future write about weird proceedings in the Senate, this hearing will occupy a most peculiar chapter.<sup>1</sup>*

Philip A. Hart, 20<sup>th</sup> August 1962

When Senator Philip Hart of Michigan made this statement, his comments were not solely for the benefit of future historians of US politics with an unusual passion for the process of judicial nominations. The statement was one of the more mild criticisms being aimed at Senator Olin D. Johnston for using his seniority on the Senate Judiciary Committee to delay and obstruct President John F. Kennedy's appointment of Thurgood Marshall – black lawyer, civil rights hero and future Justice of the Supreme Court – to the Second Circuit Court of Appeals. Although he was unable to keep Marshall from the federal bench, the senior Senator from South Carolina managed to provoke a wave of criticism that united President Kennedy with various members of the US Senate from the Democratic and Republican parties, several national newspapers, and a great many black and white Americans throughout the United States.

The Marshall Second Circuit affair provides a rare moment in which South Carolina's obsession with the power of the Federal Judiciary was laid bare before the nation without the active participation of the state's controversial junior Senator, Strom Thurmond. With Thurmond yet to take a seat on the Judiciary Committee and Ernest 'Fritz' Hollings – elected Governor in 1958 – yet to reach

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<sup>1</sup> 'Was Misquoted Says Thurgood Marshall', *Richmond Times-Dispatch*, 21<sup>st</sup> August 1962, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

Washington, DC as the state's next Senator, it was left to Olin Johnston to stand between Thurgood Marshall and a position on the Second Circuit, even if this obstruction counted for little more than an assurance to white South Carolinians that Marshall's argument before the Supreme Court in the *Brown v. Board of Education* case had not been forgotten. As Chairman of the sub-committee which would scrutinise Marshall's appointment, Johnston would have the power to determine the scheduling of the hearings, to call witnesses, to decide on the relevance of submitted materials or particular lines of questioning, and, most importantly for South Carolina's political establishment, to ensure the inclusion of Southern voices in the debate over Marshall's suitability for the Federal Judiciary. As the previous chapter has explained, Johnston's opposition to the nomination of Simon Sobeloff to the Fourth Circuit Court of Appeals represented the first hotly-contested judicial nomination following the announcement of the *Brown* decision. With Marshall's nomination to the Second Circuit, the mild-mannered Johnston adopted an altogether more blatant form of obstruction, and rarely had South Carolina's scathing attitude toward the Supreme Court been so evident in the actions of one man acting alone.

While this chapter may or may not do justice to Senator Hart's prediction, it will function as an illustration of research objective (2) by explaining the disproportionate influence of South Carolina's political agenda on a national scale, and also research objective (5), by analysing the belligerent actions of the much-overlooked Olin Johnston in the increasingly combative arena of the judicial nominations process. It should be remembered that although Marshall had been nominated for a Circuit Court, rather than a Supreme Court, position, the nation's highest court remained the backdrop to this drama, for three reasons. Firstly, Johnston's tactics were influenced to a great extent by South Carolina's ongoing war on the Earl Warren-led Supreme Court of the 1950s and 1960s: while waiting to be confirmed by the Judiciary Committee, Marshall served on the Second Circuit on a recess appointment for a ten-month period, during which the Supreme Court handed down two of the most important rulings of the Warren

Court era. Both *Baker v. Carr*, which gave federal courts the power of intervention in matters relating to malapportioned legislatures, and *Engel v. Vitale*, which ruled teacher-led prayer in public schools to be unconstitutional, were met with condemnation from the South, where both decisions were viewed as dangerous developments in the Supreme Court's repeated encroachment into the autonomy of the Southern states. The sheer magnitude of such rulings meant that the nomination of any prominent liberal to a position on the Federal Judiciary would inevitably be handled with extreme caution by Southern Senators.

Secondly, it is clear that Johnston's obstructionism was influenced in part by a concern that if Marshall was to be given an easy ride for a Circuit Court appointment, there may be a risk of Kennedy or a future President promoting him to the Supreme Court.<sup>2</sup> If this was the case, Johnston's fears proved well-founded: having faced down the quiet but determined Johnston to secure his Second Circuit appointment in 1962, Marshall would later face an onslaught of sustained provocation at the hands of the abrasive Strom Thurmond after President Lyndon Johnson selected him as the first African American Supreme Court nominee in the nation's history, in 1967. Johnston's lonely campaign during the Second Circuit hearings provided only the first stage in South Carolina's resistance to Marshall's career advancement. By 1967, the stakes were even higher, and, as Chapter Five will illustrate, both Thurmond and Fritz Hollings would make their own unique contributions to Marshall's long journey to the Supreme Court.

Thirdly, given that Johnston and Thurmond had placed such an emphasis on standards of qualification for Supreme Court nominees during the late 1950s, as discussed in the previous chapter, it was imperative that Johnston pursued these standards ruthlessly when scrutinising Marshall, who, in 1961, was only the second African American appointed to a federal judicial position, and the first since the announcement of the much-hated *Brown* decision in 1954. As with the Sobeloff episode covered in the previous chapter, the demands of South Carolina's internal politics temporarily shifted Johnston's attention from the

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<sup>2</sup> Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (Macon, GA: Mercer University Press, 1995), p.365.

Supreme Court nomination process to the appointments being made to the lower courts, yet with the Supreme Court's influence continuing to provide the impetus for his obstructionism. In this regard, this chapter will substantiate research objective (6) by highlighting not only the importance of lower court appointments in South Carolina's war on the Supreme Court, but also the contribution of the state's Senators to the intensification of the nomination process as it applied to the Courts of Appeal.

The chapter opens by providing, for the purposes of historical context, an outline of Thurgood Marshall's role in the landmark case of *Briggs v. Elliott* – which would later form an essential component of the *Brown* decision – and also a brief but relevant account of Olin Johnston's journey to the US Senate. There follows an in-depth account of the confirmation hearings, with a particular emphasis on Johnston's role at the centre of South Carolina's political development during the early 1960s, after which the chapter argues that the influence of the Southern members of the Judiciary Committee had become evident in the co-ordinated efforts of the Kennedy Justice Department to prepare nominees for the ordeal of facing down Dixie during their confirmation hearings. Concluding remarks will then be offered to situate the Marshall Second Circuit controversy in the wider context of the South Carolinian influence on the judicial nominations process.

### **Home of the White Man's Soul**

Of all the men and women who have sat before the Senate Judiciary Committee, none has better known the experience of facing down Dixie than Thurgood Marshall, and few were better prepared for the cynicism, attempted smears and gruelling questions which Southern Judiciary Committee members were prepared to offer judicial nominees by the early 1960s. During his time as Chief Counsel for the National Association for the Advancement of Coloured People (NAACP) Legal



Defense Fund, Marshall argued thirty-two cases before the US Supreme Court, winning on twenty-nine occasions.<sup>3</sup> Each of these cases constituted a landmark decision in the Court's history, establishing Marshall's reputation as a hero of the civil rights movement: with *Shelly v. Kraemer* (1948), Marshall persuaded the Court to strike down the enforcement of racially-restrictive covenants, while in the cases of *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents* (both 1950), he convinced all nine of the Court's Justices to strike down racial discrimination in graduate education institutions.<sup>4</sup> Although the ground-breaking *Sweatt* and *McLaurin* triumphs had given him the confidence to seek out a new case involving segregated education in schools, Marshall understood that each and every victory he scored for African American rights also constituted a hammer blow to the 'Southern' way of life. Psychologist Kenneth Clark, whose research into child psychology would prove vitally important in Marshall's successful *Brown* argument a few years later, recalled travelling with Marshall by train to South Carolina in 1951. It was not Marshall's first visit to the state, as he had already argued successfully for equal pay for black teachers there in 1944, and also for an end to the state's all-white primary system in 1947, but Clark noticed Marshall's demeanour change considerably as the train went deeper into the South, looking gradually more serious and offering little other than the solemn declaration that he was 'tired of trying to save the white man's soul.'<sup>5</sup>

Nonetheless, Marshall's visit to South Carolina in 1951 to argue against Clarendon County's system of segregated schooling proved to be one of the defining moments of the civil rights era.<sup>6</sup> Having found twenty black South Carolinian parents who were willing to attach their names to an NAACP legal brief despite the risk of losing their employment, Marshall planned only to criticise the

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<sup>3</sup> Bob Woodward and Scott Armstrong, *The Brethren* (New York, NY: Simon and Schuster, 1979), p.52.

<sup>4</sup> Juan Williams, *Thurgood Marshall: American Revolutionary* (New York, NY: Random House, 1998), p.149-51; p.175-6; James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy* (Oxford: Oxford University Press, 2002), p.17-18; Adam Fairclough, *Better Day Coming: Blacks and Equality, 1890-2000* (London: Penguin, 2001), p.218; Barbara A. Perry, *A 'Representative' Supreme Court? The Impact of Race, Religion and Gender on Appointments* (London: Greenwood Press, 1991), p.97.

<sup>5</sup> Williams, *Thurgood Marshall*, p.199.

<sup>6</sup> John Monk, 'Preface', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.xxi-xxiv; p.xxii.

disparities between black and white schools in Clarendon County.<sup>7</sup> Of the three-judge panel hearing the case, one judge would prove to be sympathetic toward, even enthusiastic for, Marshall's argument: Judge J. Waties Waring had established himself as a notorious figure in the South only a few years earlier when he had nullified the attempt of Olin Johnston and other senior Democrats to abolish the South Carolina primary system following the Supreme Court's *Smith v. Allwright* decision.<sup>8</sup> As if this act of defiance had not been enough, Waring had made no secret of his sympathy with Thurgood Marshall's anti-segregation arguments when the latter came to South Carolina to challenge the all-white primary and the state's treatment of black teachers.<sup>9</sup> One particularly notable irony in the story of Thurgood Marshall and South Carolina is the manner in which Judge Waring inspired Marshall to question the constitutionality of segregation per se.<sup>10</sup> Having once again defied the white Southern establishment by inviting Marshall to dinner at his home, Waring shared with Marshall his personal view that the original NAACP brief – dealing solely with the racial inequalities in Clarendon County's school system – did not go far enough. Despite being startled by the judge's suggestion that he make a case for the unconstitutionality of segregation itself, Marshall followed Waring's advice, and, after redrafting his brief, argued in court that the entire system of segregated schooling had a corrosive effect on black children, causing lasting mental and emotional damage.

South Carolina's counsel, Robert M. Figg Jr, was able to neutralise Marshall's argument by making the surprising concession that the quality of the state's black schools was not on a par with schools for white children, and that the differences could and would be addressed during a period of state investment.<sup>11</sup> The other two members of the three-judge panel – South Carolinian George Bell Timmerman, and North Carolinian John J. Parker, who had been an unsuccessful

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<sup>7</sup> David Robertson, *Sly and Able: A Political Biography of James F. Byrnes* (New York, NY: W.W. Norton and Co, 1994), p.506; Patterson, *Brown v. Board*, p.26.

<sup>8</sup> V.O. Key, *Southern Politics in State and Nation* (New York, NY: Vintage, 1949), p.628; Peter F. Lau, *Democracy Rising: South Carolina and the Fight for Black Equality Since 1865* (Louisville: University Press of Kentucky, 2006), p.95.

<sup>9</sup> Williams, *Thurgood Marshall*, p.199-203.

<sup>10</sup> Earl Black and Merle Black, *Politics and Society in the South* (Cambridge, MA: Harvard University Press, 1989), p.93; Jim Felder, *Civil Rights in South Carolina* (Charleston, SC: The History Press, 2012), p.48.

<sup>11</sup> Robertson, *Sly and Able*, p.509.

nominee for the Supreme Court in 1930 – sided with Figg, indicating an expectation that the state’s schools would be made ‘equal’ within six months. Waring remained supportive of Marshall on the bench: not only did he re-iterate Marshall’s arguments during the hearing, he also requested that Chief Judge Parker order repairmen to cease work on the street outside, as the sound of pounding jackhammers mysteriously started up every time Thurgood Marshall began speaking.<sup>12</sup> Following the final presentations of the hearing, Waring returned home and complained bitterly to his wife about the manner in which the other two judges had dismissed Marshall’s argument, claiming he had told them that Governor James F. Byrnes – who, as explained in the previous chapter, had instructed Figg to off-set Marshall’s case by admitting to the disgraceful state of South Carolina’s black schools – was ‘no better and even worse than Thurmond.’<sup>13</sup>

It is highly significant that Marshall was inspired, encouraged and even pushed to make his ground-breaking *Briggs* argument by a member of South Carolina’s white legal establishment. The fact that the same argument would be used by Marshall three years later to change the course of American history with *Brown* only makes Judge Waring’s courage in the face of enormous social and political pressure seem even more remarkable. Yet the judge would pay a heavy price for siding with Marshall in *Briggs*. His refusal to go along with Judge Timmerman and Chief Judge Parker led to an onslaught of personal abuse which finally drove him out of Charleston and into retirement.<sup>14</sup> Following Waring’s replacement by the segregationist Judge Ashton H. Williams, Marshall’s case was rejected unanimously when the panel reconvened in March 1952 to hear the appeal. Their conclusion was that the state of South Carolina had improved the quality of its black schools sufficiently.<sup>15</sup> Spectators had travelled miles to watch the NAACP hero face down the white legal establishment, and over five hundred of them had attempted, in ninety-degree heat, to squeeze into a courtroom which

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<sup>12</sup> Williams, *Thurgood Marshall*, p.202.

<sup>13</sup> Robertson, *Sly and Able*, p.509-10.

<sup>14</sup> J.W. Peltason, *58 Lonely Men: Southern Federal Judges and School Desegregation* (Chicago, IL: University of Illinois Press, 1971), p.10; Felder, *Civil Rights*, p.49.

<sup>15</sup> Peltason, *58 Lonely Men*, p.73.

would seat only seventy-five.<sup>16</sup> Marshall, who was asked at one point by Chief Judge Parker to instruct the excitable crowd to settle down, later pointed out that this chaotic scene made a mockery of white Southern claims that black Americans were content to live under segregation.<sup>17</sup> Despite being viewed as a messiah figure by the enormous black crowd, Marshall was reminded of the white Southern attitude toward his crusade at the close of proceedings, when one South Carolinian lawyer shouted out, 'If you ever show your black ass in Clarendon County again, you'll be dead.'<sup>18</sup>

Although defeated in South Carolina, Marshall's experience there provided the momentum for a bigger challenge to segregated schools that would have far greater implications. When, in 1953, he was given another opportunity to make the argument suggested to him by Judge Waring, it would be before the Justices of the US Supreme Court. The 1953-54 hearings grouped together *Briggs* and four other cases relating to schools, and resulted in the landmark *Brown* decision, which invalidated completely all systems of segregation in public schools in the United States. Although delighted by his triumph, the words offered by legendary lawyer John W. Davis as he shook Marshall's hand and conceded defeat (quoted at the beginning of the previous chapter) almost certainly reminded Marshall that years of trouble lay ahead, with most of it in all probability originating in the Southern states.<sup>19</sup>

### **Accommodating the South**

While the politicians of the South Carolina lowcountry, with its dense African American population, were unable to escape what V.O. Key has characterised as

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<sup>16</sup> Williams, *Thurgood Marshall*, p.201.

<sup>17</sup> Thurgood Marshall and Robert Carter, 'Real Heroes in S.C.', *Baltimore Afro-American*, 16 June 1951, p.4, cited in Williams, *Thurgood Marshall*, p.201; Orville Vernon Burton et al., 'Seeds in Unlikely Soil: The *Briggs v. Elliott* School Desegregation Case', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.176-200; p188.

<sup>18</sup> William Henry Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (New York, NY: Oxford University Press, 1973), cited in Williams, *Thurgood Marshall*, p.203.

<sup>19</sup> Williams, *Thurgood Marshall*, p.229.

the state's pre-occupation with race issues, the enigmatic upcountryman Olin D. Johnston was able to win election as the state's Governor in 1934 by focusing on New Deal and class-related matters.<sup>20</sup> The existence of segregated unions ensured that the activism of a small number of black workers was successfully contained, resulting in little interest in race on the part of white upcountry mill workers during the 1930s, yet the apparent freedom of campaigning on a New Deal platform which neglected racial tensions within the mill communities would prove to be a temporary luxury for Governor Johnston.<sup>21</sup> In the run-up to the 1938 Senate election, President Franklin D. Roosevelt endorsed Johnston as his candidate as part of an attempted purge of New Deal critics 'Cotton Ed' Smith in South Carolina and Walter F. George in Georgia.<sup>22</sup> Despite Roosevelt's popularity in the state, his endorsement cost Johnston badly, with South Carolinians resenting the President's interference in the campaign. Johnston's support for the Congress of Industrial Organisations (CIO) was not appreciated in regions where voters remained hostile to workers' rights, and despite winning the mill precincts overwhelmingly, his reluctance to pursue the race issue would cost him badly in the 'black belt' counties, where 'Cotton Ed' Smith maintained his support base with an uncompromising stand for white supremacy.<sup>23</sup>

The growing intensity of the race issue during the 1940s, as evidenced by the rapidly-increasing membership of the NAACP, and the need for candidates to appeal to voters in all regions of the state, not least the deeply conservative counties of the lowcountry, forced Johnston to reconsider the extent to which he would use race in a future run for the Senate.<sup>24</sup> In a re-match with the ailing Smith

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<sup>20</sup> Bryant Simon, *A Fabric of Defeat* (Chapel Hill, NC: University of North Carolina Press, 1998), p.200; p.205-6; Key, *Southern Politics*, p.130-1; Dewey G. Grantham, *The Life and Death of the Solid South: A Political History* (Lexington, KY: University Press of Kentucky, 1988), p.98-9.

<sup>21</sup> G.C. Waldrep III, *Southern Workers and the Search for Community* (Chicago, IL: University of Chicago Press, 2000), p.49-50; Timothy Minchin, *Hiring The Black Worker: The Racial Integration of the South Textile Industry, 1960-1980* (Chapel Hill: University of North Carolina Press, 1999), p.217.

<sup>22</sup> Bruce J. Schulman, *From Cotton Belt To Sunbelt* (Durham: Duke University Press, 1994), p.52-3; K. Michael Prince, *Rally Round the Flag, Boys!* (Columbia, SC: University of South Carolina Press, 2004), p.28; Wim Roefs, 'The Impact of 1940s Civil Rights Activism on the State's 1960s Scene: A Hypothesis and Historiographical Discussion', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.156-175; p.160.

<sup>23</sup> J.P. Shannon, 'Presidential Politics in the South – 1938, II', *The Journal of Politics* 1:3 (August 1939), pp.278-300, p.288; Simon, *Fabric of Defeat*, p.210; V.O. Key, *Southern Politics* (New York, NY: Vintage), p.143.

<sup>24</sup> Simon, *Fabric of Defeat*, p.221.

in 1944, Johnston made the Supreme Court's *Smith v. Allwright* decision a central theme in his campaign by leading the fight against the ruling of the nine Justices that the all-white primary system was unconstitutional.<sup>25</sup> He had attempted during the 1938 campaign to dismiss the race issue by claiming that 'every Southerner' was opposed to the Costigan-Wagner anti-lynching bill 'and it's not an issue in this campaign,' but his approach had changed markedly by 1944.<sup>26</sup> Johnston's reluctance to promote his white supremacist credentials is quite evident in the various versions of a speech from that year's Senate campaign, with a draft dated 14<sup>th</sup> June containing the claim that 'I am not now, and have never been, in favour of social or political equality of the white and black races,' while still making clear that 'I do not intend to base my campaign to the high office of the United States Senate on this issue.'<sup>27</sup> However, by 24<sup>th</sup> July – the day before polling day – the paragraph in question had been expanded considerably to include the claim that 'as soon as the Supreme Court handed down its decision ... I immediately called a special session and recommended legislation that was passed by a unanimous vote of both the House and Senate which assured the people of South Carolina white Democratic government. Had it not been for my action, tomorrow you would be walking along with Negroes to the ballot box.'<sup>28</sup>

Although the Governor's stand against the Supreme Court proved popular with conservative voters, who elected him to the Senate the following day, his attempt to reform the state's primary system was ultimately foiled three years later by none other than Judge J. Waties Waring of the US District Court in Charleston. In his ruling in *Elmore v. Rice* (1947), Waring declared that 'it is time for South Carolina to re-join the Union. It is time to fall in step with the other states and to adopt the American way of conducting elections.'<sup>29</sup> With South

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<sup>25</sup> Charles L. Zelden, *The Battle for the Black Ballot: Smith v. Allwright and the Defeat of the Texas All-White Primary* (Lawrence, KS: University Press of Kansas, 2004), p.112; Key, *Southern Politics*, p.627-30.

<sup>26</sup> Simon, *Fabric of Defeat*, p.206.

<sup>27</sup> Draft of speech by Governor Olin D. Johnston, 14<sup>th</sup> June 1944, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 120, 1944, June-July.

<sup>28</sup> Draft of speech by Governor Olin D. Johnston, 24<sup>th</sup> July 1944, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 120, 1944, June-July.

<sup>29</sup> James O. Farmer, 'Memories and Forebodings: The Fight to Preserve the White Democratic Primary in South Carolina', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.243-251;

Carolina's newspapers condemning the ruling, and the Ku Klux Klan leaving burning crosses outside his home, Waring became the subject of an unsuccessful impeachment attempt led by Congressman L. Mendel Rivers.<sup>30</sup> A brief preview of the Southern reaction to *Brown* seven years later was offered by Governor Strom Thurmond's claim that he was 'shocked' by the *Elmore* decision.<sup>31</sup> Johnston would later refer to the controversial Charlestonian as 'the obnoxious Judge J. Waties Waring of Charleston, who ... left his party and our way of life.'<sup>32</sup>

Alongside fellow New Deal liberal Southerners such as Lister Hill of Alabama, Johnston signed the Southern Manifesto without question.<sup>33</sup> He also kept up, albeit very carefully, a relationship with conservative organisations such as the white Citizens' Councils, formed as a means of community resistance in response to the *Brown* decision, regularly appearing at anti-desegregation rallies and other events across South Carolina, and responded courteously to letters from Council officials.<sup>34</sup> The Senator's handling of the judicial nominations made by President Dwight D. Eisenhower – particularly the Fourth Circuit nomination of Simon Sobeloff – provided an early indication of Johnston's willingness to use his influence on the Senate Judiciary Committee to maintain his conservative credentials on the segregation issue.

Eisenhower's successor in the White House had declared an intention to promote black judges to the federal bench during his presidential campaign in 1960, but John F. Kennedy hesitated before nominating Thurgood Marshall to fill a vacancy on the Second Circuit Court of Appeals.<sup>35</sup> While Marshall had the support of the Administration's chief black advisor, Louis Martin, and also Kennedy's considerable number of black supporters, the President was advised by his brother, Attorney General Robert Kennedy, that a Marshall appointment would

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p.249; Robert Mickey, *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015), p.103; Key, *Southern Politics*, p.628.

<sup>30</sup> Felder, *Civil Rights*, p.42.

<sup>31</sup> Mickey, *Paths*, p.108.

<sup>32</sup> Press release from the office of Senator Olin D. Johnston, 23<sup>rd</sup> October 1956; Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 54, Folder 4.

<sup>33</sup> Virginia Van der Veer Hamilton, *Lister Hill: Statesman from the South* (Chapel Hill, NC: University of North Carolina Press, 1987), p.213; Anthony J. Badger, 'Southerners Who Refused to Sign the Southern Manifesto', in Anthony J. Badger, *New Deal/New South: an Anthony J. Badger Reader* (Louisville: University of Arkansas Press, 2007), pp.72-87; p.72-3.

<sup>34</sup> Grantham, *The Life and Death*, p.135.

<sup>35</sup> Perry, *A Representative Supreme Court?*, p.96.

have to be achieved in defiance of Southern objections, which might prove politically costly if and when Southern support was required for the Administration's legislative proposals.<sup>36</sup> After Marshall refused a District Court appointment, Kennedy nominated him to the Second Circuit over the objection of his brother, only for the Senate Judiciary Committee, under the leadership of Chairman James Eastland of Mississippi, to put an immediate delay on confirmation hearings.<sup>37</sup> Knowing that the Committee would hold up the nomination indefinitely, Kennedy gave Marshall a recess appointment on 5<sup>th</sup> October 1961, allowing him to serve on the Second Circuit on the condition that he would be scrutinised and confirmed when Eastland finally agreed to hold hearings.<sup>38</sup>

The President re-submitted Marshall's name on 15<sup>th</sup> January 1962, but the nomination was still in limbo on 1<sup>st</sup> April, when Justice Charles Evans Whittaker retired from the Supreme Court, giving the President and his brother the brand new dilemma of whether or not to offer the nomination of another black judge, this time for the nation's most powerful court.<sup>39</sup> The obvious candidate was Judge William H. Hastie, who had, in 1949, become the first black judge ever appointed to a US Court of Appeals when nominated by President Harry S. Truman.<sup>40</sup> Despite particularly enthusiastic support from Robert Kennedy, Hastie eventually lost out to Deputy US Attorney General Byron White, as President Kennedy did not wish to risk another confrontation with Southern Senators following his unsuccessful attempt to create a Department of Housing and Urban Development (HUD) under the leadership of black economist Robert C. Weaver.<sup>41</sup> Like Hastie, Weaver had been a member of Franklin Roosevelt's 'black cabinet' in the 1930s, a group which – as Southern Senators would have recalled – gathered together prominent black

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<sup>36</sup> *Ibid.*, p.97.

<sup>37</sup> Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991* (Oxford: Oxford University Press, 1997), p.9; Perry, *ibid.*, p.97; Williams, *Thurgood Marshall*, p.292.

<sup>38</sup> Williams, *Thurgood Marshall*, p.296.

<sup>39</sup> Henry J. Abraham, *Justices, Presidents and Senators* (New York, NY: Rowman and Littlefield, 1999); Williams, *Thurgood Marshall*, p.298.

<sup>40</sup> Perry, *A Representative Supreme Court?*, p.95; Abraham, *Justices, Presidents*, p.209.

<sup>41</sup> David A. Yalof, *Pursuit of Justices* (Chicago, IL: University of Chicago Press, 1999), p.75-9; Perry, *A Representative Supreme Court?*, p.98-9; Christine L. Nemacheck, *Strategic Selection* (Charlottesville, VA: University of Virginia Press, 2008), p.51; Abraham, *Justices, Presidents*, p.209.



Americans into a loosely-co-ordinated group which would theoretically influence federal policies relating to race relations in the 1930s.<sup>42</sup> Kennedy remained concerned that a Hastie nomination would jeopardise the support of senior Southerners such as Senate Finance Committee Chairman Robert C. Byrd of West Virginia, whose influence was necessary to ensure the smooth passage of the Administration's economic reforms through Congress.<sup>43</sup> Furthermore, Kennedy was mindful of the fact that Marshall's Second Circuit appointment had still not been approved by the Senate after six months, and the nomination of Hastie for the Supreme Court might be seen as a provocative act by Chairman Eastland.

On 22<sup>nd</sup> February, Eastland handpicked three Senators to sit as a sub-committee to scrutinise Thurgood Marshall's nomination: Democrat John McClellan of Arkansas, Republican Roman Hruska of Nebraska, and, to chair the sub-committee, Democrat Olin Johnston of South Carolina.<sup>44</sup> The appointment of Johnston as Chair proved critical in determining the course of events. By now a senior member of the Judiciary Committee, the South Carolinian would no doubt have recalled that William Hastie had stood shoulder-to-shoulder with Marshall when making the NAACP's case for the unconstitutionality of the all-white primary during the Supreme Court's hearings for the *Smith* case.<sup>45</sup> The pressure mounting on Johnston to pursue a war on the Court only grew throughout 1961, during which he received a string of letters from Southern voters, urging him to add his support to the campaign of The John Birch Society to impeach Chief Justice Earl Warren. Despite adopting a cautious tone in some of his responses by reminding his constituents that all impeachment proceedings must be brought by the House of Representatives rather than the Senate, Johnston was far more sympathetic in other letters, telling one impeachment enthusiast from Orangeburg, South

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<sup>42</sup> Nancy J. Weiss, *Farewell to the Party of Lincoln: Black Politics in the Age of FDR* (Princeton, NJ: Princeton University Press, 1983), p.137-8; Mickey, *Paths*, p.99.

<sup>43</sup> Yalof, *Pursuit of Justices*, p.78.

<sup>44</sup> Williams, *Thurgood Marshall*, p.298-9.

<sup>45</sup> Orville Vernon Burton et al, 'South Carolina', in Chandler Davidson and Bernard N. Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, NJ: Princeton University Press, 1994), pp.191-232, p.195; Darlene Clark Hine, *Black Victory: The Rise and Fall of the White Primary in Texas* (Columbia, MO: University of Missouri Press, 2003), p.244; Key, *Southern Politics*, p.146; Williams, *Thurgood Marshall*, p.111; Farmer, 'Memories and Forebodings', p.245.

Carolina, that 'I shall certainly bring your suggestion to the attention of the other members of the Senate from the Southern states, and I know that they will be glad to have your suggestion. I certainly agree that many of the recent decisions of the Supreme Court are contrary to our way of thinking.'<sup>46</sup>

To complicate matters further, Johnston's fixation with the power of the Supreme Court would only intensify during Marshall's six months on a recess appointment: on 26<sup>th</sup> March 1962, the Court handed down its landmark *Baker v. Carr* decision, which made the unprecedented judgement that federal courts were entitled to intervene in matters relating to malapportioned legislatures. In a newsletter released four days later, Johnston denounced the Court's opinion, arguing that 'by allowing federal district courts to step into strictly legislative affairs, the nation's entire election system may well be destroyed.'<sup>47</sup> This outrage at the Court's action seems unsurprising given the huge importance of *Baker* in the evolution of the relationship between the states and the Federal Government. Gordon Silverstein has equated the significance of *Baker* with the significance of *Brown* in that the Supreme Court, in both decisions, 'commanded' other institutions to act, providing two dramatic illustrations of the profound political power of the nine unelected Justices.<sup>48</sup> Considered by Earl Warren to be the most important case of his tenure as Chief Justice, *Baker* dispensed with the notion of a 'political-question doctrine' as a limit to judicial power, a development which Justice Felix Frankfurter feared would increase accusations of judicial activism and trigger an enormous political backlash.<sup>49</sup>

*Baker* presented a particularly grave problem for South Carolina's conservative political establishment. As explained in the Introduction, the legislators representing counties in the lowcountry region, with black majority

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<sup>46</sup> Letter from Olin D. Johnston to Dora K. Fogartie, 23<sup>rd</sup> June 1961, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 83, Folder 101B; Letter from Olin D. Johnston to E.G. Schuler, 13<sup>th</sup> January 1961, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 83, Folder 101B.

<sup>47</sup> Newsletter from the office of Olin D. Johnston, 30<sup>th</sup> March 1962, Edgar A. Brown Collection, MSS 381-393, Johnston, Olin D., Box 30, Folder 390.

<sup>48</sup> Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics* (Cambridge: Cambridge University Press, 2009), p.33-4; p.51-3.

<sup>49</sup> Mark Silverstein, *Judicious Choices: The Politics of Supreme Court Appointments* (London: Norton, 1994), p.54; G. Silverstein, *Law's Allure*, p.51.

populations, maintained an ironclad control over South Carolina's legislature thanks to the very principle of malapportionment which the *Baker* case had addressed. The announcement of the decision was inevitably met with condemnation by the state's leaders, notably Senator Edgar A. Brown – long associated with the so-called 'Barnwell Ring' and described by V.O. Key as the state's Prime Minister – who described *Baker* as 'the political crisis of my time.'<sup>50</sup> The state embarked on a lengthy battle against the order to reconstruct its system of representation, refusing to accept the inevitability of a more democratic form of apportionment until the Supreme Court's announcement of *Stevenson v. West* in 1975.<sup>51</sup>

With Johnston and other outraged South Carolinians describing *Baker* in typically apocalyptic language, the Kennedy brothers openly embraced the Court's ruling, with the President claiming at a press conference that 'to have each vote count equally is, it seems to me, basic to the successful operation of a democracy,' a comment which would have given Olin Johnston little incentive to schedule Thurgood Marshall's confirmation hearings with any urgency.<sup>52</sup> The frequent delays being imposed by Johnston at this time provide a useful example of how South Carolina's internal politics were influencing political controversy at the national level with regard to the Supreme Court. By the end of April, Johnston was heavily involved in warding off a strong primary challenge from the state's youthful and highly popular Governor, Ernest 'Fritz' Hollings, and the ageing Senator did not wish to jeopardise re-election by appearing to show mercy to the notorious black lawyer who had spoken so eloquently against the Southern way of life during the *Brown* hearings. Furthermore, it was crucial for Johnston to address increasing white anxiety over frequent incidents of racial unrest on South Carolina's streets: during 1960 and 1961, the sit-in movement came to South Carolina, with a large number of civil rights protests occurring throughout the

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<sup>50</sup> Bryant Simon, 'The Devaluation of the Vote: Legislative Apportionment and Inequality in South Carolina, 1890-1962', *The South Carolina Historical Magazine* 101:3 (July 2000), pp.234-252; p.247-8.

<sup>51</sup> Douglas Smith, 'Into the Political Thicket: Reapportionment and the Rise of Suburban Power', in Matthew Lassiter and Joseph Crespino (eds.), *The Myth of Southern Exceptionalism* (Oxford: Oxford University Press, 2009), p.263-85; p.278; Simon, 'The Devaluation', p.251.

<sup>52</sup> M. Silverstein, *Judicious Choices*, p.55; G. Silverstein, *Law's Allure*, p.53.

state, among them sit-ins at branches of S.H. Kress in Orangeburg, Columbia and Charleston, and also the ground-breaking 'Friendship Nine' protest at McCrory's in Rock Hill, which made history when nine protesters chose to serve time in jail, rather than being bailed, in order to cause administrative inconvenience while saving the civil rights movement money.<sup>53</sup>

While Governor Hollings was ensuring public safety through crowd control and the use of black police officers to maintain calm, Senator Johnston used his newsletters as a means of condemning civil rights protests such as the 'Freedom Rides', claiming that 'the real courage does not exist ... in the actions of the Freedom Riders, but lies with the Southern people, both white and Negro, who have lived together quietly and peacefully and who have solved in harmony their differences and achieved progress through the years.'<sup>54</sup> This sentiment built on themes covered in 'The Good Side of the South', an article attributed to Johnston (but ghost-written by his Press Secretary, Thomas W. Chadwick) and published in September 1961 in *The New York Times*, which made the dubious claim that 'in South Carolina ... there has not been one case where a Negro has been denied the right to register or vote since records have been maintained showing the race of voters.'<sup>55</sup> Under pressure to win re-election in a tense climate of increased racial unrest – and with the *Baker* decision striking the biggest blow to the survival of South Carolina's political culture since *Brown* – Johnston refused to grant Thurgood Marshall an opportunity to legitimise his selection before the sub-committee, forcing him to continue serving on a recess appointment.

Elsewhere in the US Senate, Marshall's nomination received strong support from the two Republican Senators from the state of New York, Jacob Javits and Kenneth Keating. Aside from the fact that the state of New York fell within the boundary of the Second Circuit on which Marshall was serving, both Senators had personal reasons for supporting the nominee. Javits, who had

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<sup>53</sup> See, generally, Felder, *Civil Rights*.

<sup>54</sup> Newsletter from the office of Olin D. Johnston, 9<sup>th</sup> June 1961, Edgar A. Brown Collection, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>55</sup> Olin D. Johnston, 'The Good Side of the South', *The New York Times*, 3<sup>rd</sup> September 1961, p.SM17; Herbert Hartsook interview with Thomas W. Chadwick, 26<sup>th</sup> June 1995, University of South Carolina, South Carolina Political Collections, Oral History Project [<http://library.sc.edu/file/1751>].

attended Marshall's swearing-in ceremony on 23<sup>rd</sup> October 1961, had already established a track record of standing up to South Carolina's Senators in the ongoing war over the Supreme Court: in May 1958, he had condemned proposals to reduce the Court's power through the Jenner Bill, provoking an angry response from Olin Johnston, while more recently, he had debated Strom Thurmond in the December 1961 issue of *The American Legion Magazine* on the issue of whether judges should have five years' experience on the federal bench before being nominated to the Supreme Court.<sup>56</sup> Keating, who served on the Judiciary Committee alongside Johnston, contacted his South Carolinian colleague to urge him to schedule confirmation hearings as quickly as possible due to Marshall's ongoing service on an unconfirmed appointment, and became sufficiently enraged by the frequent delays that he released a statement, criticising Johnston heavily and claiming that Marshall was being 'victimized'.<sup>57</sup> Noting the civil rights opposition of a 'majority' of the sub-committee (singling out the Chairman, the 'Senator from South Carolina', for special mention), Keating made the serious allegation that Judiciary Committee staff were being briefed to prepare material which could be used to attack Marshall during confirmation hearings – material which had not been shared with him (despite his representation of a state which falls within the Second Circuit boundary) nor with the other members of the full Committee. Keating claimed that he had 'protested the delay and procedures to Senator Eastland ... but my protests have fallen on deaf ears.'<sup>58</sup> His comments, criticisms and accusations were well-known and well-documented by the end of April, having been made on New York's WNEW-TV station, and also reported in Charleston's *News and Courier*.<sup>59</sup>

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<sup>56</sup> 'Senate in Clash Over Court Curb', *The New York Times*, 2<sup>nd</sup> May 1958, p.16; 'Should Supreme Court Appointees Have Five Years' Experience on the Bench?', *The American Legion Magazine*, December 1961, Strom Thurmond Collection, MSS100 Speeches, General File, sub-series A, Articles 1961, Box 10, Folder 794.

<sup>57</sup> Television address by Senator Kenneth Keating ('Senate Report', 29<sup>th</sup> April 1962, WNEW-TV, New York City), 20<sup>th</sup> April 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

<sup>58</sup> Keating address, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

<sup>59</sup> 'Sen. Keating To Denounce Sen. Johnston', *The News and Courier*, 28 April 1962, p.6A.

While Johnston did not respond to Keating's charges, his frequent delays did suggest a very deliberate effort to keep Marshall's appointment on ice until after the South Carolina Senate primary. Having set a date of 16<sup>th</sup> April, he delayed the hearings until 24<sup>th</sup> April, and then delayed them again until 1<sup>st</sup> May. On 1<sup>st</sup> May, neither Johnston nor McClellan showed up to the hearings, despite the fact that the date had been set by Johnston himself. McClellan was attending a session of the Senate Appropriations Committee and Johnston claimed to have been delayed on a train journey, but few were persuaded that their absence constituted anything other than the consistent Southern opposition to civil rights. In their absence, Senator Hruska sat and listened while Thurgood Marshall made a brief statement and the two Senators from New York, Javits and Keating, spoke in Marshall's defence, with Keating asserting that 'the controversy about Judge Marshall centres not about the man, but the results he has achieved.'<sup>60</sup>

The question of whether or not Kennedy made a political gesture in order to persuade James Eastland to ensure Marshall's safe passage through the confirmation hearings remains somewhat shrouded in mystery. One well-documented anecdote involves Kennedy's agreement to name Eastland's college roommate, the segregationist Judge W. Harold Cox, as a federal district judge in Mississippi. Eastland's alleged remark to Robert Kennedy – 'tell your brother that if he will give me Harold Cox, I will give him the n\*\*\*\*\*' – has never been substantiated despite being mentioned frequently in the existing literature.<sup>61</sup> Arthur Schlesinger believes that Eastland was 'softened' by Kennedy's nomination of Cox, but Mark Tushnet has argued that Cox had been nominated prior to the decision to nominate Marshall.<sup>62</sup> Juan Williams has claimed that Eastland simply assured Robert Kennedy that Marshall would be confirmed once Southern Senators had made as much political capital as possible out of the nomination.<sup>63</sup>

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<sup>60</sup> Williams, *Thurgood Marshall*, p.300; 'Marshall Gets Senate Hearing But Absentees Delay Decision', *The New York Times*, 2 May 1962, p.16.

<sup>61</sup> Arthur Schlesinger, *Robert Kennedy and His Times* (New York, NY: Ballantine Books, 1978), p.330-1; Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973* (Oxford: Oxford University Press, 1998), p.439; Perry, *A Representative Supreme Court?*, p.97; Williams, *Thurgood Marshall*, p.299; Tushnet, *Making Constitutional Law*, p.13n.

<sup>62</sup> Schlesinger, *Robert Kennedy*, p.330-1; Williams, *ibid.*, p.299.

<sup>63</sup> Tushnet, *Making Constitutional Law*, p.12.

Regardless of the accuracy or detail of the story, Victor Navasky has argued persuasively that a notional Cox/Marshall trade-off symbolises the profound systemic problem which the Kennedy brothers had to endure with regard to judicial nominations. As explained in Chapter Two, the Southern bloc had become sufficiently immovable during the tenure of President Eisenhower – who was willing to accommodate the Southern influence and who in eight years did not name a single black judge to any federal position – that the Kennedys were ultimately doomed to nominate a string of undesirable segregationist judges as ‘sweeteners’ for Southern Senators.<sup>64</sup>

Kennedy’s prediction that the process of Marshall’s confirmation would be a marathon rather than a sprint proved accurate when Johnston proceeded to spend the rest of May campaigning against Fritz Hollings in South Carolina, refusing to deal with Marshall until he had secured re-nomination. Johnston, perhaps recalling Hollings’s willingness to use race-baiting tactics during his successful 1958 run for Governor, refused to allow his youthful opponent the opportunity to accuse him of giving the notorious Marshall an easy ride – a claim which might have played well with the conservative South Carolinian voters calling for Earl Warren’s impeachment.<sup>65</sup> Aided by his seniority in the Senate, and his claim to have prevented the closure of Donaldson Air Force Base, Johnston’s hard work on the campaign trail during the months of May and June 1962, paid off handsomely when he defeated Hollings in a landslide victory, winning 216,918 votes to 110,023, and a majority in all but one of the state’s counties, losing Calhoun County by only 34 votes.<sup>66</sup>

With the Democratic nomination now secure, Johnston showed no greater sense of urgency in scheduling Marshall’s confirmation hearings, but did continue

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<sup>64</sup> Victor S. Navasky, *Kennedy Justice* (New York, NY: Atheneum, 1971), p.256.

<sup>65</sup> Earl Black, *Southern Governors and Civil Rights* (Cambridge, MA: Harvard University Press, 1976), p.80-2; Anthony J. Badger, ‘From Defiance to Moderation: South Carolina Governors and Racial Change’, in Badger, A. *New Deal/New South: an Anthony J. Badger Reader* (Louisville: University of Arkansas Press, 2007), pp.127-143, p.135-6; James C. Cobb, *The Selling of the South* (Chicago: University of Illinois Press, 1993), p.141.

<sup>66</sup> ‘Sen. Olin Johnston In Landslide S.C. Victory’, *Ocala Star-Banner*, 13 June 1962, p.27; ‘Voters Show Belief In Sen. Olin Johnston’, *The Spartanburg Herald*, 14 June 1962, p.4; Frank E. Jordan, *The Primary State: A History of the Democratic Party in South Carolina, 1896-1962* (self-published; unknown date), p.83; Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008), p.103.

to demonstrate his antagonism toward the US Supreme Court by joining with Senators James Eastland, John McClellan, and Herman Talmadge to introduce a constitutional amendment to nullify the Court's *Engel v. Vitale* decision, which ruled teacher-led prayer in public schools to be a violation of the First Amendment.<sup>67</sup> He would later find the time to preside as acting Chairman over Judiciary Committee hearings on the decision, which included testimony from Senator John Stennis of Mississippi, A. Willis Robertson of Virginia, Vance Hartke of Indiana, J. Glenn Beall of Maryland, and his South Carolina colleague, Strom Thurmond.<sup>68</sup> Just in case a reminder was needed of South Carolinian attitudes toward the Supreme Court, Thurmond issued a newsletter on 30<sup>th</sup> June 1962, in which he argued against permitting the Court 'to interpret God out of our national life.' In observing that Karl Marx aimed 'to dethrone God and destroy capitalism,' Thurmond concluded solemnly that the Court, through the school prayer decision, was 'helping Marx attain those objectives.'<sup>69</sup> As with *Baker v. Carr*, the *Engel* decision only encouraged Southern Senators to be more vigilant in their duty to their constituents on the question of judicial nominations.

### **The Long Game Gets Longer**

The three members of the Johnston sub-committee finally met on 12<sup>th</sup> July 1962 to assess Thurgood Marshall's Second Circuit nomination. Chairman Johnston employed a hostile strategy from the start by unleashing the Committee's special counsel – L.P.B. Lipscomb of Mississippi – who interrogated Marshall at length regarding an obscure Texas District Court decision in which the NAACP had been found guilty of practicing law illegally. Senator Keating of New York pointed out that Marshall had not been associated with the case, and was joined in his

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<sup>67</sup> 'Eastland Offers Amendment', *The New York Times*, 30<sup>th</sup> June 1962, p.20.

<sup>68</sup> Newsletter from the office of Senator Olin D. Johnston, 27<sup>th</sup> July 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390; 'Senators Ask Action on Prayer Decision', *The Washington Post*, 27<sup>th</sup> July 1962, p.A2.

<sup>69</sup> Newsletter from the office of Senator Strom Thurmond, 30<sup>th</sup> June 1962, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries A, General File (1935-1983), Press Releases 1962, Box 13, Folder 1109.



protests by Republican Senator Everett Dirksen of Illinois. Johnston defended Lipscomb throughout the hearing, even insisting that he proceed to interrogate Marshall regarding another NAACP case held in Virginia, which drew further objections from Republican Senators, with both Dirksen and Keating protesting that it would be inappropriate to discuss cases still before the Supreme Court on appeal:

**Senator Keating:** Well, Mr Chairman, may I make a comment, that we are not here concerned with investigating the NAACP. We are here concerned with the investigation of the qualifications of this nominee, as to his character, ability and integrity, to be a US circuit judge.

**Senator Johnston:** That is true, but at the same time, the question is before this committee as to whether or not, in his activities and as a witness and attorney for the NAACP, just what he has done in that line.

**Senator Keating:** Well, we could spend the rest of this session doing nothing but examining and investigating the NAACP, and I would hope that counsel would make more progress than he has up to the time or up to date.

**Senator Johnston:** I think when he brings in the Virginia case and ties in the two, you will see the connection in the two cases.<sup>70</sup>

Following further fruitless questioning from Lipscomb, Johnston decided to adjourn the hearings at noon without setting a date for the next hearing. The frustration of Marshall and others in the room was palpable:

**Senator Keating:** Has the time been fixed, Mr Chairman for –

**Senator Johnston:** No, it has not. The subcommittee is adjourned.

**Judge Marshall:** Well, Mr Chairman, would it possibly be tomorrow? I wonder whether I should stay over or not.

**Senator Johnston:** Well, not tomorrow. I can tell you that right now.

**Judge Marshall:** Well, I would like to get back to my work. That is the only reason –

**Senator Johnston:** It will not. We will notify you in advance. We will arrange it as early as possible. The committee is adjourned.<sup>71</sup>

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<sup>70</sup> Hearings Before a Subcommittee of the Judiciary, United States Senate, Eighty-Seventh Congress, Second Session of Nomination of Thurgood Marshall, of New York, to be United States Circuit Judge for the Second Circuit, printed for the use of the Committee on the Judiciary, 12<sup>th</sup> July 1962, p.46-7.

<sup>71</sup> *Ibid.*, p.49.

Having defended the sub-committee lawyer's interrogation of Marshall throughout the session, Johnston maintained a correspondence with Lipscomb and even encouraged him to undertake further investigations. After receiving a letter from a Mrs E. Sinclair Eaton of Gainesville, Florida, informing him of a television film relating to Marshall and the US Constitution, Johnston forwarded the letter to Lipscomb (without informing Mrs Eaton), telling him, 'I thought you might be interested in looking into this matter.'<sup>72</sup>

Perhaps sensing the support for Marshall which existed within the full Senate, Dirksen and Keating attempted to force a hearing to be scheduled on the afternoon of 8<sup>th</sup> August by obtaining permission from the Senate itself. Despite Dirksen's seniority as Republican floor leader, this effort was shot down in flames when Johnston objected, claiming that one morning session would be sufficient, and also that the Judiciary Committee was required to meet during the afternoon to discuss President Kennedy's plans for tighter drug control legislation.<sup>73</sup> Although Johnston's veto over scheduling remained his trump card, the shambolic 12<sup>th</sup> July hearing suggested he had very little in the way of credible ammunition to use against the nominee. He mysteriously informed *The News and Courier* two days later that the power to question Marshall 'may soon be lifted' from him by the full Judiciary Committee, leaving him powerless to scrutinise the nominee or prevent confirmation. Referring to this possibility as 'the sharpest piece of political strategy in 1962', the paper's editorial concluded that 'Sen. Johnston has to ask himself whether South Carolina voters would accept full committee action as straightforward, or see it as a political trick for the benefit of a fellow politician.'<sup>74</sup> With the state's press noting the remarkably low voter turnout in the June primary, Johnston was now under pressure to ensure that the 75,000-100,000 white voters who had stayed at home during the June primary would not defect

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<sup>72</sup> Letter from Olin D. Johnston to Mrs E. Sinclair Eaton, 21<sup>st</sup> August 1962; letter from Olin D. Johnston to L.P.B. Lipscomb, 21<sup>st</sup> August 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 3.

<sup>73</sup> 'Sen. Johnston Blocks GOP Move To Conduct Marshall Hearings', *The News and Courier*, 7<sup>th</sup> August 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>74</sup> 'Johnston And Marshall', *The News and Courier*, 17<sup>th</sup> July 1962, p.8A, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

to the Republican Party in November, when he would face a strong challenge to his Senate seat from columnist W.D. Workman.<sup>75</sup>

By mid-July, the Thurgood Marshall affair had stirred emotions among the South's white conservatives. Many of them outlined their opposition to Marshall's appointment in plain terms in letters to Johnston, with one Spartanburg, South Carolina resident assuring him that 'the whole South will always love and respect you if you will help keep the Negroes and the Jews out of office' and a Biloxi, Mississippi resident hoping for further delays while expressing the view that, in the event of Marshall's confirmation, 'let's hope they'll keep him in the East and North – JFK will probably put him on the US Supreme Court.'<sup>76</sup> More surprising is the huge number of letters Johnston received from supporters advising him to cease delaying the hearings and simply accept the inevitability of Marshall's confirmation. Many of these supporters were only too happy to remind Johnston that they had voted for him in the June primary, while other correspondents had proved even more crucial in securing the Senator's re-nomination.

In his response to former state Senator Calhoun Thomas, dated 9<sup>th</sup> August 1962, Johnston stressed that 'my victory in June would never have been what it was without the efforts you put out, particularly in Beaufort County, the home of my opponent's campaign manager.'<sup>77</sup> In his letter, Thomas had warned that the Senator would lose crucial black support in the November election if he continued to delay Marshall's confirmation, declaring that 'I have talked to a number of the Negro leaders in this vicinity. They understand what you are doing and your reason for your actions. They feel, though, that you are hurting yourself by this because it is not being understood by the mass of the Negro voters. They and I feel that you have very little to gain and will run a possible loss of a great many

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<sup>75</sup> Letter from Walter Brown to Strom Thurmond, 13<sup>th</sup> July 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1; 'Voters Show Belief In Sen. Olin Johnston', *The Spartanburg Herald*, 14 June 1962, p.4; 'Johnston And Marshall', *The News and Courier*, 17<sup>th</sup> July 1962, p.8A, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

<sup>76</sup> Letter from Harry N. Johnson to Olin D. Johnston, 18<sup>th</sup> June 1962; letter from Mabel B. Sheldon to Olin D. Johnston, 9<sup>th</sup> July 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

<sup>77</sup> Letter from Boston Brice to Olin D. Johnston, 20<sup>th</sup> July 1962; letter from Olin D. Johnston to Calhoun Thomas, 16<sup>th</sup> August 1962; Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

votes if you continue to delay an action.’<sup>78</sup> Johnston conceded that Thomas’s letter contained ‘a mighty strong well-taken point’, but Thomas was not the only supporter making this argument: one Augusta, Georgia correspondent reminded Johnston that ‘the Negroes in South Carolina have been largely responsible for your going to the Senate in Washington and since Mr Marshall is qualified and had been cleared by the Justice Department before his nomination, we cannot understand your move in this matter.’<sup>79</sup>

The extent of the ongoing support for South Carolina’s senior Senator among the state’s 70,000 registered black voters – and the concern of the black population over Marshall’s nomination – should have been obvious to Johnston from the letters sent to him by black correspondents during the summer of 1962.<sup>80</sup> These included an endorsement for Marshall from the Rock Hill Chapter of the much-hated NAACP; a letter from John H. McCray of the South Carolina Progressive Democrats, explaining that ‘we South Carolina Negro voters won our status in the Democratic Party largely through the efforts and ability of Mr Marshall’, and a letter from C.B. Bailey – who met with Johnston as ‘the only Negro postal employee from South Carolina’ during a pay rise rally which the Senator attended in his capacity as Chairman of the Senate Post Office and Civil Service Committee – advising that Johnston’s embarrassment of Marshall ‘will be of no advantage to you in the fall election, or in any other situation.’<sup>81</sup> Further endorsements for Marshall (from both black and white sources) continued flooding in to Johnston’s office from outside South Carolina: by the end of the first week of July, he had been urged to confirm Marshall by the Managing Editor of the *Birmingham (Alabama) World*; the Treasurer of *The Philadelphia Enquirer*, and

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<sup>78</sup> Letter from Calhoun Thomas to Olin D. Johnston, 9<sup>th</sup> August 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

<sup>79</sup> Letter from Olin D. Johnston to Calhoun Thomas, 16<sup>th</sup> August 1962; letter from J.M. Hinton to Olin D. Johnston, 20<sup>th</sup> July 1962, Letter from Olin D. Johnston to Calhoun Thomas, 16<sup>th</sup> August 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

<sup>80</sup> ‘Johnston And Marshall’, *The News and Courier*, 17<sup>th</sup> July 1962, p.8A, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

<sup>81</sup> Letter from Rock Hill Chapter N.A.A.C.P. to Olin D. Johnston, 28<sup>th</sup> June 1962; letter from John H. McCray to Olin D. Johnston, 20<sup>th</sup> July 1962; letter from C.B. Bailey to Olin D. Johnston, 27<sup>th</sup> July 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101 Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

the Chairman of the 'Thurgood Marshall Confirmation Committee' of the Washington Bar Association of the District of Columbia.<sup>82</sup>

Given the outpouring of enthusiasm for Thurgood Marshall's confirmation in Johnston's correspondence, it seems surprising that the Senator opted to defy so many of his supporters by continuing to delay and inconvenience the nominee with his hostile tactics as sub-committee Chairman. On the other hand, his actions seem quite logical in the context of his correspondence with South Carolina's conservative political establishment. Despite his sensational victory over Fritz Hollings in the June primary, Johnston remained aware of the unimpressive white turnout, and shared the concern of others in the South Carolina Democratic Party of the danger of potential white votes being secured by the Republican Party thanks to the appeal of W.D. Workman's segregationist campaign. As in most Southern states, victory in the Democratic primary usually guaranteed election in November – given the lack of credible Republican opposition – resulting in the additional risk of white voters staying at home, viewing the November 1962 Senate election result as a foregone conclusion. Since Johnston's last election victory six years previously, the Republican Party, thanks in part to the efforts of Senator Barry Goldwater of Arizona, had made inroads in the South by capitalising on white disillusionment with civil rights measures, and now, as South Carolina's senior Senator, Johnston inevitably came under great pressure to ensure the continued dominance of the Democratic Party in the state, and do everything within his power to stamp out the flames of the burgeoning two-party system.<sup>83</sup>

Senator Edgar A. Brown, President Pro Tempore of the South Carolina Senate, wrote to Johnston frequently during the second half of 1962, informing him optimistically that 'we are making an all-out drive to get out a full vote which is the answer to the Republicans. If the same vote is polled in this election as was polled in the primary, you will beat Workman in the same proportion you beat

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<sup>82</sup> Letter from Emory O. Jackson to Olin D. Johnston, 26<sup>th</sup> June 1962, letter from Eustace Gay to Olin D. Johnston, 2<sup>nd</sup> July 1962; letter from E. Lewis Ferrell to Olin D. Johnston, 4<sup>th</sup> July 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

<sup>83</sup> See Russell Merritt, 'The Senatorial Election of 1962 and the Rise of Two-Party Politics in South Carolina', *The South Carolina Historical Magazine* 98:3 (1997), pp.281-301.

Fritz.<sup>84</sup> Johnston was reminded of his importance in resisting the Republican insurgency by Charles A. Lafitte, President of the Carolina Commercial Bank, who declared that 'some of my good friends who have always voted Democratic with me have changed and will vote otherwise in November. The situation to me appears serious and I strongly urge you to immediately get busy in South Carolina and try to counteract some of this trend.'<sup>85</sup> Congressman Charles E. Simons was particularly unnerved by enthusiasm for the Republican Party in his home county, warning Solomon Blatt, Speaker of the South Carolina House of Representatives, that 'we are having a terrible fight here in Aiken County as I am sure you are aware. Everywhere I turn I find strong Workman-Spence supporters, which has me very much concerned about our carrying Aiken County.'<sup>86</sup> Johnston was dispatched to a rally at the Aiken High School Stadium, but Senator Brown advised Charles Lafitte that 'Olin is not going to have time to cover every county and they are going to try to make Aiken a rousing one to break the ice in this Goldwater political atmosphere in our area.'<sup>87</sup>

In addition to the growing anxiety over the Republican threat, there is evidence to suggest a lingering resentment over the manner in which President Eisenhower dismissed the recommendation of Strom Thurmond that he nominate South Carolinian Robert Figg (who had opposed Marshall in the *Briggs v. Elliott* case) to the Fourth Circuit Court of Appeals, opting instead to appoint Marylander Simon Sobeloff. By the spring of 1962, Thurmond and Walter Brown, one of his most trusted political advisors, were pre-occupied with obtaining Johnston's endorsement of Figg for a vacancy on the United States District Court for the Eastern District of South Carolina, left by the death of Judge Ashton H. Williams. As Brown outlined in a letter to Thurmond, 'as I see it, there cannot be a greater

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<sup>84</sup> Letter from Edgar A. Brown to Olin D. Johnston, 15<sup>th</sup> October 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>85</sup> Letter from Charles A. Lafitte to Olin D. Johnston, 4<sup>th</sup> October 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390; 'Johnston Supporters Plan Strong October Campaign', *The News and Courier*, 28<sup>th</sup> September 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>86</sup> Letter from Charles E. Simons to Solomon Blatt, 13<sup>th</sup> October 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>87</sup> Letter from Edgar A. Brown to Charles A. Lafitte, 6<sup>th</sup> October 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

travesty of justice than for Thurgood Marshall, who represented the NAACP before the Court, to be put on the Circuit Court of Appeals and for Bob to be denied even a district judgeship in South Carolina.’<sup>88</sup> While understanding that Johnston’s lukewarm attitude toward Figg resulted from Figg’s role as Thurmond’s speechwriter during the latter’s challenge to Johnston in the bitter Democratic Party primary battle of 1950, Brown’s view neatly summed up the outrage which would have ensued in the Thurmond camp if Johnston had appeared willing to accept Marshall while at the same time appearing unwilling to accommodate Figg.

One other particularly striking aspect of the correspondence between the key members of South Carolina’s political establishment during this period is the manner in which Johnston and Thurmond were both being goaded into attacking the Supreme Court by other politicians in the state. Despite Thurmond’s years of aggressive ‘court-baiting’ since the mid-1950s, Walter Brown declared in his 11<sup>th</sup> April letter to Thurmond, ‘I would like to see you go after the Supreme Court with the same zeal and determination you have demonstrated in exposing the “no-win” policies in the State Department’, while one month later, Edgar Brown was advising Johnston to ‘take a blast at Hugo Black and the Supreme Court on the anti-prayer decision’, perhaps as a means of capitalising on accusations that Alabamian Justice Black had ‘betrayed’ the South with his role in *Brown v. Board of Education*.<sup>89</sup> The attitude of the state’s Democratic politicians toward South Carolina’s black population was evident in Edgar Brown’s letter to Johnston on 14<sup>th</sup> June, in which he stated, ‘The “n\*\*\*\*\*” has more civil rights now than he can use, and if some of our friends would only realise that a citizen must be capable of exercising the rights which are inherently his before he can start a riot to obtain those rights we would be much better off.’<sup>90</sup> And few would have been surprised by Strom Thurmond’s view, outlined in a letter to Ralph B. Kolb, Chairman of the

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<sup>88</sup> Letter from Walter Brown to Strom Thurmond, 11<sup>th</sup> April 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1.

<sup>89</sup> Letter from Walter Brown to Strom Thurmond, 11<sup>th</sup> April 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1; letter from Edgar A. Brown to Olin D. Johnston, 18<sup>th</sup> July 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390; Roger K. Newman, *Hugo Black: A Biography* (New York, NY: Pantheon), p.538.

<sup>90</sup> Letter from Edgar A. Brown to Olin D. Johnston, 14<sup>th</sup> June 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

Sumter County Citizens' Council, that 'Marshall is nothing but a trouble-maker and in view of his activities on behalf of the NAACP he could never render a fair and objective decision.'<sup>91</sup>

The anti-Court sentiments expressed by South Carolina's political establishment drowned out the huge wave of enthusiasm for Thurgood Marshall's Second Circuit appointment, which was quite apparent in the letters of support for Marshall sent to Johnston's office throughout the year by black and white Americans alike. While a racially moderate public sphere may have begun to emerge in South Carolina by the early 1960s, the kingpins of the state legislature remained determined to keep an iron grip on the state's political affairs, even after the announcement of *Baker v. Carr*. As Johnston's correspondence suggests, many of the more liberal-minded voters continued to re-elect the senior Senator, but the pressure exerted by the state's most powerful political figures ensured that Johnston's seniority would continue to function as an extension of their racially conservative agenda on a national scale.

### **Olin Draws a Breath**

By the middle of August 1962, Olin Johnston felt that he had delayed Thurgood Marshall's confirmation hearings sufficiently. During the month, he would allow himself and his allies further opportunities to scrutinise Marshall, forcing the nominee to face down Dixie in three further hearings.

During the first August hearing, Senator Kenneth Keating maintained the onslaught of criticism he had been directing at Johnston for months, arguing that other recent nominees – specifically Robert J. Elliott of Georgia and the aforementioned W. Harold Cox of Mississippi – had not been investigated with the same rigour, nor were the activities of their law firms scrutinised in a manner

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<sup>91</sup> Letter from Strom Thurmond to Ralph B. Kolb, 11<sup>th</sup> August 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1.



similar to Johnston's focus on the NAACP.<sup>92</sup> It was not long before the press picked up on the double standard argument. As James Marlow noted in *The Nashua Telegraph*, the Supreme Court nomination of Byron White was not even investigated by a sub-committee: 'Although the full committee probably knew far less about White than it did about Marshall, a brief hearing was held April 11 and White got unanimous committee approval. That same day, the full Senate approved.'<sup>93</sup> By the end of August, Johnston was being targeted by other public figures, including baseball legend Jackie Robinson, who threw accusations of racism at the sub-committee in his news column, and former First Lady Eleanor Roosevelt, who considered the hearings a worldwide embarrassment.<sup>94</sup> At the second August hearing, Marshall's critics persisted with the familiar tactic of linking the NAACP to communism. Losing patience, Keating and Democratic Senator John A. Carroll of Colorado announced that they would consider moves to discharge the sub-committee if Johnston allowed further pointless hearings to continue. 'I do hope the two Senators that have spoken are not making that in the form of a threat to the sub-committee' was Johnston's terse response.<sup>95</sup>

At a further hearing on 17<sup>th</sup> August, Marshall was challenged on his alleged remark that the NAACP had 'the law, religion and God' on its side. He denied making the remark but made his views on the South quite clear when he declared to the sub-committee that 'anybody who takes a man out and lynches him, I believe is working with the devil.'<sup>96</sup> The sub-committee's use of the 'law, religion and God' remark proved to be as feeble as the other 'evidence' used against Marshall at earlier hearings, but material presented at the next session, held on 20<sup>th</sup> August, at least managed to elicit a more newsworthy result. The hearings focused on a speech delivered at the annual meeting of the American Historical Society on 28<sup>th</sup> December 1961 – published as an essay in the *US News and World*

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<sup>92</sup> Hearings Before a Subcommittee of the Judiciary, United States Senate, Eighty-Seventh Congress, Second Session of Nomination of Thurgood Marshall, of New York, to be United States Circuit Judge for the Second Circuit, printed for the use of the Committee on the Judiciary, 8<sup>th</sup> August 1962, p.55.

<sup>93</sup> 'Dixie Senators Stall Appointment Of Negro', *Nashua Telegraph*, 27 August 1962, p.14.

<sup>94</sup> Williams, *Thurgood Marshall*, p.301.

<sup>95</sup> Hearings, 8<sup>th</sup> August 1962, p.56; 'Marshall Hearing May End Next Week', *The News and Courier*, 9<sup>th</sup> August 1962, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

<sup>96</sup> Hearings, 17<sup>th</sup> August 1962, p.117.

*Report* on 5<sup>th</sup> February 1962 – by Dr Alfred H. Kelly, Professor of History at Wayne State University in Detroit, Michigan.

In the speech and essay, Kelly, who had assisted with NAACP research into the school segregation cases, claimed that Marshall was prone to making racially-charged jokes, offering one choice quote as an example: ‘When us colored folk take over, every time a white man draws a breath, he’ll have to pay a fine.’<sup>97</sup> It is unclear how or when the three members of the sub-committee became aware of this potentially explosive remark. If Senator Keating was correct in the allegations made in his April statement, the speech may have been unearthed by a member of the Judiciary Committee staff. What can be confirmed is that Johnston was made aware of the speech as early as 9<sup>th</sup> July, when it was sent to him by a constituent, and reminded of it on 7<sup>th</sup> August, when excerpts were sent to him by Ralph B. Kolb, of the Sumter County Citizens Council.<sup>98</sup> Among the remarks in the speech were the following reflections on the *Brown* case:

The problem we faced was not the historian’s discovery of the truth, whole truth, and nothing but the truth. It is not that we were engaged in formulating lies; there was nothing as crude and naïve as that. But we were using facts, emphasising facts, sliding off facts, quietly ignoring facts, and above all, interpreting facts in a way to do what Marshall said we had to do – ‘get by the boys down there’.<sup>99</sup>

Johnston may or may not have agreed with Kolb’s view that the text of the speech ‘furnishes sufficient ammunition to forcibly bring before the nation the fraud involved in the Court’s decision in the schools cases.’<sup>100</sup> He had, however, along with other Southerners, always questioned the legitimacy of the *Brown* decision’s reliance on ‘sociological’ sources such as Gunnar Myrdal’s *An American Dilemma*. The remark concerning the white man paying a fine for drawing a

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<sup>97</sup> Williams, *Thurgood Marshall*, p.301-2.

<sup>98</sup> Letter from Mabel B. Sheldon to Olin D. Johnston, 9<sup>th</sup> July 1962; letter from Ralph B. Kolb to Olin D. Johnston, 7<sup>th</sup> August 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1.

<sup>99</sup> Hearings, 19<sup>th</sup> July 1967, p.182.

<sup>100</sup> Letter from Ralph B. Kolb to Olin D. Johnston, 7<sup>th</sup> August 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1.

breath would prove sufficiently offensive to conservative white Southerners to justify Johnston's call for a further hearing, during which the sub-committee would hear from Dr Kelly personally. That request triggered one of the more tense exchanges of the hearings:

**Senator Johnston:** I will call the sub-committee together, the three of us, and I will lay this before them to see what they want to do. I think that is the logical thing for me to do as one member here of the committee, and that is what I am going to do.

**Senator Hart:** Mr Chairman, if I could, neither Senator Keating nor I are members of this sub-committee.

**Senator Johnston:** You are visitors. I am glad to let you make a statement, but just remember you are not on the sub-committee.

**Senator Keating:** But we are on the full Committee.

**Senator Johnston:** But you are not on the sub-committee.

**Senator Keating:** It will be in the hands of the full Committee unless this meeting is quickly closed. This is a ridiculous procedure and an unlawyer-like procedure, and it will be my intention to raise the problem before the full Committee.

**Senator Johnston:** You have a perfect right to do that, but as far as the sub-committee, we want to get the facts before the full committee. I don't know what the man who wrote the articles in the newspaper will come and say.<sup>101</sup>

Having decided he had had enough, Keating claimed that he would make a request to Chairman Eastland for the sub-committee hearings to be terminated and a vote taken on Marshall in the full Senate, taking the matter to the Senate floor if necessary.<sup>102</sup> Senator Philip Hart of Michigan, who by now had added his voice to Keating's objections, defended the nominee by claiming that Marshall's 'reputation in American jurisprudence is established. We will indict ourselves if we fail to acknowledge it.'<sup>103</sup>

Despite his reluctance to antagonise Southern Senators, President Kennedy was finally moved to use his influence to draw the hearings to a close. Given that the one-year anniversary of the recess appointment was approaching –

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<sup>101</sup> Hearings, 20<sup>th</sup> August 1962, p.178.

<sup>102</sup> 'Senators Still In Row Over Negro Federal Judge', 21<sup>st</sup> August 1962, *Tampa Tribune*, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

<sup>103</sup> Williams, *Thurgood Marshall*, p.302.

meaning that Marshall would stop getting paid if he remained unconfirmed – Kennedy had already taken action to ensure that Marshall would not have to work without a pay cheque.<sup>104</sup> At a press conference, Kennedy said that confirmation had been ‘too much delayed’ and expressed confidence that the Senate would not adjourn without taking action on Marshall’s appointment.<sup>105</sup> However, even the intervention of the President of the United States did not deter Chairman Johnston from pursuing one final hearing, on 24<sup>th</sup> August, during which Dr Kelly was questioned on Marshall’s ‘pay a fine’ quote. To those who knew Marshall personally, Kelly’s claim that the remark was ‘mordant humour, given exclamation by a man possessed of a powerful sense of humour’ would have seemed quite plausible.<sup>106</sup> Bob Woodward and Scott Armstrong have claimed that Marshall would typically use humour to unsettle well-to-do white people in his company, such as Chief Justice Warren Burger. When Burger and Marshall were both on the Supreme Court some years later, Marshall would address Burger with the idiosyncratic greeting, ‘What’s shakin’, Chiefy-baby?’ Another anecdote has an amused Justice Marshall responding ‘yowsa yowsa’ to a man mistaking him for an elevator operator in the Supreme Court building.<sup>107</sup> While Johnston may have been unconvinced by Kelly’s explanation, the nation’s press remained undisturbed by the idea of Thurgood Marshall having a ‘mordant’ sense of humour, with Mary McGrory commenting in *The Atlanta Constitution* that ‘nobody has ever said this quality would be unbecoming in a federal judge.’<sup>108</sup> *The Washington Post* argued that Marshall’s remark ‘could have been only a jest’ while ridiculing the ‘flimsiness of Senator Johnston’s opposition’, asking the reader, ‘is a notoriously prejudiced Senator to be allowed to defeat the appointment of a well-qualified Negro to the federal bench simply by endlessly stringing out his hearings?’<sup>109</sup>

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<sup>104</sup> *Ibid.*, p.301.

<sup>105</sup> ‘Nominee Marshall’, *The New York Times*, 26<sup>th</sup> August 1962, p.52.

<sup>106</sup> Hearings, 24<sup>th</sup> August 1962, p.183.

<sup>107</sup> Woodward and Armstrong, *The Brethren*, p.67.

<sup>108</sup> ‘Marshall’s Humour Backfires On Him’, *The Atlanta Constitution*, 28<sup>th</sup> August 1962, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

<sup>109</sup> ‘Inexcusable Stalling’, *The Washington Post*, 22<sup>nd</sup> August 1962, Olin D. Johnston Collection, Senate Papers, News Clippings, Box 136, Marshall, Thurgood.

After Kelly's testimony failed to yield any negative material to be used against the nominee, Lipscomb read from a section of *Newsweek* magazine, which recorded Marshall as declaring, 'We've negotiated too quietly and too reasonably for too long. We've made up our minds to harass the legal hell out of the school boards. From here on out, we're going to be unreasonable, un-decent, and un-everything else.' The inclusion of this quote on the record brought protests from Marshall's exasperated supporters:

**Senator Keating:** Is this – might I enquire whether this is offered as proof of the facts stated?

**Senator Johnston:** This is offered as being printed in *Newsweek* of September 18, 1961, for whatever it is worth.

**Senator Hart:** What's it worth? What's it worth, then, in light of the problem facing the Committee?

**Senator Johnston:** This is a very prominent magazine, and I think a lot of us read it, and I know I read it, and try to keep up with what's going on in the world, like a lot of other people do.

**Senator Keating:** I might comment it is in line with some of the other legal antics which have taken place in these hearings.

**Senator Hart:** Mr Chairman, if this concludes the hearing –

**Senator Johnston:** Yes, this concludes the hearing, is that right?

**Senator Hart:** Amen and thank heaven, and let's not berate or review the chronology.<sup>110</sup>

Having drawn criticism from the nation's press and been pressurised to desist by the President and several outspoken Senators, Johnston finally announced that he did not intend to question Thurgood Marshall further, but caused another tense exchange with Hart and Keating with his insistence that the hearings be printed before the sub-committee reached a decision.<sup>111</sup> As if to signal the end of Johnston's crusade, *The New York Times* noted that Senator Keating's move to end the sub-committee hearings and bring the nomination to the Senate floor for a vote 'would enable Senator Johnston to tell South Carolinians that he had done all in his power to resist the nomination.'<sup>112</sup>

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<sup>110</sup> Hearings, 24<sup>th</sup> August 1962, p.207.

<sup>111</sup> *Ibid.*, p.208-9.

<sup>112</sup> 'Nominee Marshall', *The New York Times*, 26<sup>th</sup> August 1962, p.152.

Despite Strom Thurmond's gloomy prediction that 'if the nomination reaches the floor, there will be a fight', Marshall was confirmed by a Senate vote of 54-16.<sup>113</sup> The sub-committee had voted privately to reject Marshall following the conclusion of hearings, with only Senator Hruska supporting the nominee. When the full committee took a vote, Johnston and McClellan were joined by Chairman Eastland and Senator Sam Ervin of North Carolina in opposing Marshall, and the four dissenters were joined by fourteen other Southern Democrats when the full Senate voted.<sup>114</sup> Thurgood Marshall's appointment had finally been legitimised, but, as he would discover before the end of the decade, his days of facing down Dixie were far from over.

### **Masters of the Ritual**

As with Johnston's prioritisation of the Sobeloff appointment to the Fourth Circuit over the selection of William Brennan for the Supreme Court, the Senator evidently considered the Marshall Second Circuit nomination far more important than President Kennedy's choice of Arthur J. Goldberg to fill the Supreme Court vacancy left by the retirement of Justice Felix Frankfurter.<sup>115</sup> Unlike the drawn-out confrontation over Marshall's appointment, the Goldberg hearings lasted only one day, during which the nominee charmed the Judiciary Committee, having been briefed in advance by Jim Adler, a former law clerk to Chief Justice Warren and also Justice Charles Evans Whittaker.<sup>116</sup>

As explained in the previous chapter, President Eisenhower's letter to his Attorney General in September 1958 highlighted an acknowledgement of the strong Southern influence within the Senate Judiciary Committee. The existence of a Justice Department briefing paper, prepared for Goldberg prior to his Committee hearings in 1962, offers further compelling evidence that the Kennedy

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<sup>113</sup> 'Senate Fight On Marshall Forecast', *The Washington Post*, 26<sup>th</sup> August 1962, p.A6.

<sup>114</sup> Williams, *Thurgood Marshall*, p.303.

<sup>115</sup> Yalof, *Pursuit of Justices*, p.80-1; M. Silverstein, *Judicious Choices*, p.55.

<sup>116</sup> Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York, NY: Riverhead, 2007), p.393.

Administration also acknowledged the Southern influence as a highly significant potential roadblock to the confirmation of Supreme Court nominees. Extracts from this paper provide great insight into the Administration's expectation of the content and style of Judiciary Committee questioning during this period. Given the tense nature of Potter Stewart's confirmation hearings in 1959, also covered in the previous chapter, Justice Byron White – Kennedy's first Supreme Court appointee – recommended that Goldberg be given a transcript of the Stewart hearings as a guide to what might be expected.<sup>117</sup>

Having identified Chairman Eastland and Senator Ervin as 'chief questioners', the briefing paper offered a series of hypothetical yet 'ritualistic' questions for which 'pavlovian answers' were expected.<sup>118</sup> As part of its highly detailed advice, the paper explained that a question asking 'do you think that the courts should cite as authority for decisions, books or documents written by individuals which have never been part of the record in the case?' would be aimed essentially at the infamous Footnote 11 of the *Brown* decision, referring to Myrdal's *An American Dilemma*. Noting that 'this question was asked of both Justice Brennan and Justice Stewart and both had trouble with it', the paper advised an answer which emphasised the value of 'relevant constitutional and statutory provisions' whilst noting that 'the Court did not, in our view, cite Myrdal as precedent, but your questioner's opinion will be otherwise.'<sup>119</sup> The paper pointed out that the Committee's line of questioning could easily place a nominee in a difficult position: denying that Myrdal was cited as precedent 'will simply initiate a detrimental sideshow', but, on the other hand, accepting that Myrdal was used as a precedent would be interpreted as criticism of the *Brown* decision.<sup>120</sup> Goldberg was advised against offering evasive answers when the *Brown* decision was raised, and reminded that the brief he had filed on behalf of the CIO for the *Brown* case might be seized upon by members of the

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<sup>117</sup> 'Areas of Inquiry by the Senate Judiciary Committee', p.2, Manuscript Division, Library of Congress, Arthur Goldberg Papers Box 2, Folder 45.

<sup>118</sup> *Ibid.*, p.1.

<sup>119</sup> *Ibid.*, p.5.

<sup>120</sup> *Ibid.*, p.6.

Committee.<sup>121</sup> The paper also reminded Goldberg of a speech he had given before the annual meeting of the American Jewish Committee in 1961, condemning racial segregation in private clubs, which might also be scrutinised by the Committee, particularly as the Supreme Court had dealt with a number of ‘sit-in’ cases during the past term.<sup>122</sup>

Significantly, the paper referred to both *Baker v. Carr* and *Engel v. Vitale* as areas of concern for Committee members, and suggested that Goldberg offer diplomatic responses in order to demonstrate a sound knowledge of the cases in question.<sup>123</sup> With such meticulous preparation, Goldberg faced the Committee with confidence and was confirmed by a voice vote in the Senate with only one objection: South Carolina’s Senator Strom Thurmond demonstrated his state’s consistent scepticism of the Kennedy Administration’s judicial nominees.<sup>124</sup> Thurmond’s opposition notwithstanding, the existence of a detailed and well-researched Justice Department briefing paper, intended to advise nominees on how to face the Senate Judiciary Committee, illustrates the extent to which marathon judicial hearings had become an institution by the end of 1962, thanks in no small part to the Southern segregationist influence. As with the Sobeloff controversy discussed in the previous chapter, Olin Johnston’s obstruction of Thurgood Marshall’s Second Circuit appointment serves as a reminder of the prominent role of South Carolina in the swift development of judicial nomination hearings into confrontational events of increasing public interest. In line with research objective (1), future chapters will showcase the state’s leading role in the intensification of hearings to determine the suitability of nominees for the high court during the Johnson and Nixon Presidencies.

Following Marshall’s confirmation, Johnston continued to receive letters of criticism from Marshall’s supporters, many of which came from the state of New York. Perhaps taking the protests of their Senators as their cue, New Yorkers

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<sup>121</sup> *Ibid.*, p.7.

<sup>122</sup> *Ibid.*, p.8.

<sup>123</sup> *Ibid.*, p.11; p.14

<sup>124</sup> James A. Thorpe, ‘The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee’, 18 *Journal of Public Law* (1969), pp.371-402; p.387; Newton, *Justice for All*, p.393.



expressed varying degrees of outrage over Johnston's handling of the Marshall nomination, one declaring 'I am white and I'm deeply ashamed of some of my kind, you included'; another stating 'your constituents in South Carolina may be proud of your efforts ... as for me, I think they are disgusting', and one New York-based Southerner asking Johnston 'not to add to the stigma under which the South labors as the alleged hospitable home of bigotry.'<sup>125</sup> It is unlikely that Johnston would have been moved by these sentiments. Having already blamed the state of New York for inciting racial unrest through forced integration, he had reminded Southerners of his views on the state in a speech given in Alabama in May when he argued that 'as soon as you develop a strong two-party system in the South you are going to get the same minority vote baiting that you have in cities like New York,' while also using the opportunity to take aim at his New York critics: 'How would you like living on the civil rights issue with Jacob Javits, Kenneth Keating, Barry Goldwater or another Eisenhower?'<sup>126</sup>

It was with pep talks such as these that Johnston succeeded in winning re-election against the formidable challenge of Republican W.D. Workman in November's Senate election.<sup>127</sup> With his victory over Workman, by 178,712 votes to 133,930, Johnston secured himself another six-year term by easing Democratic fears of a Republican insurgency, albeit temporarily. Through his rough treatment of Thurgood Marshall, he was able to maintain segregationist credentials and maximise white conservative turnout while at the same time minimising the civil rights issue to give the impression of being the more moderate of the two candidates.<sup>128</sup> He was able to emphasise his loyalty to the Democratic Party as a means of discouraging a voter exodus to the Republicans, while at the same time distancing himself from President Kennedy, who had angered many white

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<sup>125</sup> Letter from Mrs A.A. Feder to Olin D. Johnston, 22<sup>nd</sup> August 1962; letter from Robert G. Ervin, 22<sup>nd</sup> August 1962; letter from Charles J. Turck to Olin D. Johnston 27<sup>th</sup> August 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 4.

<sup>126</sup> 'South Can't Afford 2-Party Luxury, Sen. Johnston Says', *The News and Courier*, 11<sup>th</sup> May 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>127</sup> See Merritt, 'The Senatorial Election of 1962', pp.281-301; 'Johnston Labels GOP Votes Protests Against President', *The News and Courier*, 8<sup>th</sup> November 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>128</sup> Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction* (Baltimore: Johns Hopkins University Press, 1975), p.98; 'Johnston Wins County Vote', *The Newberry Observer*, 6 November 1962, p.1.

Southerners by sending federal troops to the University of Mississippi in October 1962 to ensure the admission of black student James Meredith amid scenes of violent resistance and chaos.<sup>129</sup> He still managed to win the endorsement of the Kennedy administration, thanks to his seniority on Senate committees, and also managed to convince a sufficient number of South Carolina's registered black voters to stick with him despite his treatment of Marshall.<sup>130</sup> In Charleston, he was supported by approximately nine out of ten registered black voters.<sup>131</sup>

Recalling Johnston's success in attracting black support over the more conservative Strom Thurmond during the 1950 Democratic primary, John H. McCray was quick to attribute the Senator's 1962 victory to the black vote: 'Take 25,000 Negro votes away from Sen. Johnston in the last general election and Mr Workman would now be on his way to the US Senate in Washington.'<sup>132</sup> The logic of supporting Johnston simply for being the more moderate candidate was evident even in the letters of criticism which the Senator continued to receive up until the election, with one pro-Marshall student telling him 'you have my support against Workman ... I consider you the lesser of two evils.'<sup>133</sup> Nonetheless, Johnston's victory did not make him complacent. Frank E. Jordan, in his famous history of South Carolina's elections from 1896 to 1962, argued that 'although Johnston was successful against W.D. Workman, that race [from 1962] concluded the story of the one-party system.'<sup>134</sup> As the following chapter will explain, the state of South Carolina would soon become a hotbed of dramatic Republican Party growth, thanks in no small part to the influence of Johnston's colleague, the unpredictable Strom Thurmond.<sup>135</sup>

The question of whether or not Olin Johnston succeeded in discouraging John F. Kennedy from promoting Thurgood Marshall to the US Supreme Court will

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<sup>129</sup> Bartley and Graham, *Southern Politics*, p.97; 'Johnston Labels GOP Votes Protests Against President', *The News and Courier*, 8<sup>th</sup> November 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>130</sup> Hollings and Victor, *Making Government Work*, p.102-3; 'Influence of Negro Vote Grows', *The News and Courier*, 17<sup>th</sup> January 1963, p.1, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>131</sup> Bartley and Graham, *Southern Politics*, p.98.

<sup>132</sup> 'Johnston's Victory Attributed To Negroes', *The News and Courier*, 3<sup>rd</sup> December 1962, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

<sup>133</sup> Letter from Thom Hiers to Olin D. Johnston, 4<sup>th</sup> September 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 1.

<sup>134</sup> Jordan, *Primary State*, p.83.

<sup>135</sup> Grantham, *Life and Death*, p.169; Bartley and Graham, *Southern Politics*, p.123.

never be answered. Following Kennedy's murder in Dallas on 22<sup>nd</sup> November 1963, the new President, Lyndon Johnson, opted to set up a Commission to investigate Kennedy's assassination. Even under such traumatic conditions, Johnson was reminded of the ongoing Southern hatred of Chief Justice Earl Warren only one week after Kennedy's death: both James Eastland of Mississippi and Richard Russell of Georgia advised Johnson to appoint Justice John Marshall Harlan, rather than Warren, as head of the new Commission, with Russell even refusing to serve on the Commission if it meant serving alongside Warren.<sup>136</sup> The new President would also be forced to address South Carolina's ongoing obsession with judicial nominations by filling the District Court vacancy which Kennedy had neglected, in addition to a second vacancy which had appeared following the announcement of Judge Timmerman's retirement in September 1962.<sup>137</sup> The increasing restlessness of South Carolina's politicians for the appointment of their two new judges is evident in a note sent by Edgar Brown to Olin Johnston twelve days after Kennedy's assassination, which read: 'Am I right in the grapevine information which I have received that no further appointments are going to be announced until after the mourning period? Also, if you will be a little confidential, are our two agreed upon?'<sup>138</sup>

Having obstructed the confirmation of Simon Sobeloff to the Fourth Circuit Court of Appeals in 1955 and 1956, and Thurgood Marshall's confirmation as the new judge on the Second Circuit Court of Appeals in 1961 and 1962, Olin Johnston had ensured national recognition of South Carolina's response to the *Brown* decision through the federal nominations process. What makes the Marshall episode more significant than the gestures made by South Carolina's Senators during the period covered in Chapter Two is the manner in which a stark example

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<sup>136</sup> Telephone conversation between Lyndon B. Johnson and James Eastland, 29<sup>th</sup> November 1963, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, K6311.06; telephone conversation between Lyndon Johnson and Richard Russell, 29<sup>th</sup> November 1963, Lyndon B. Johnson Presidential Recordings, Miller Center, University of Virginia, K6311.06). An official reason for Eastland and Russell both offering Justice Harlan as an alternative to Chief Justice Warren has never materialised, but it is likely that both Senators appreciated Harlan's moderate voice on the Court, and his dissent in the notorious *Baker v. Carr* would also have been noted. See G. Silverstein, *Law's Allure*, p.53.

<sup>137</sup> Letter from George Bell Timmerman to Olin D. Johnston and Strom Thurmond, 18<sup>th</sup> September 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 2.

<sup>138</sup> Note from Edgar A. Brown to Olin D. Johnston, 4<sup>th</sup> December 1963, Edgar A. Brown Collection, MSS 381-393, Johnston, Olin D., Box 30, Folder 390.

was offered of a Southern Senator using his seniority to respond to state concerns on a national scale. With a far more challenging re-election effort to face in 1962 than his most recent contest in 1956 (the year of his sustained objection to Sobeloff), it is difficult to deny that Johnston's behaviour throughout the Marshall controversy was influenced entirely by the political situation in South Carolina, yet the nationwide scale of his actions was evident in a national chorus of condemnation which included a President, several Senators, a sporting hero, a former First Lady, and several influential African American political activists. With the Potter Stewart hearings suggesting the potential for an intensifying Supreme Court nomination process, the Sobeloff and Marshall appointments showcased South Carolina's leading role in the growing political importance of lower court nominations.

Furthermore, Johnston's obstruction of Marshall's Second Circuit appointment offered a fascinating suggestion of future events in the story of the state's war on the Supreme Court. Firstly, his masterful understanding of South Carolina's electorate – and his success in appealing to conservative white voters with a gesture guaranteed to antagonise African Americans without compromising his share of the black vote – would be evident twenty-five years later, when his successor, Fritz Hollings, found himself in a similar situation when supporting the controversial Supreme Court nomination of Robert Bork. Hollings's position throughout the lengthy deliberations over Bork's nomination, covered extensively in Chapter Seven, suggested that little had changed for South Carolina's Senators in the nomination process for Supreme Court Justices. The condemnation of Bork by black South Carolinians, in addition to a multitude of liberal interest groups, did not prove sufficiently compelling for Hollings to vote against confirmation, and so, as with Johnston's determined stand against Marshall, the need to retain a sizeable share of the white conservative vote ultimately eclipsed the growing demands of South Carolina's black community.

Secondly, the leading role of South Carolina in opposing Marshall's Second Circuit appointment offered a highly significant prologue to the tensions created

by Marshall's nomination to the Supreme Court in 1967, which will be examined in depth in the following chapter. As will be explained, the arrival of Fritz Hollings in the Senate marked the beginning of a lengthy partnership between Hollings and Strom Thurmond, which would last for thirty-six years. In Thurmond and Hollings, the state of South Carolina would be represented by two very different Senators, with Thurmond defecting to the Republican Party in 1964 and becoming a major force in the burgeoning US conservative movement, and Hollings building on his work as Governor by maintaining a moderate ideology, addressing more directly the needs of South Carolina's black voting bloc, which grew significantly following the passage of the Voting Rights Act in 1965. Yet, as Chapter Five will explain, the nomination of Thurgood Marshall to become the first African American on the nation's highest court marked the beginning of a highly conservative Thurmond/Hollings record on Supreme Court nominations, throughout which these very different men appeared to agree far more than they disagreed.

## **CHAPTER FOUR:**

### **Between Thurmond and Thurgood:**

#### **The Arrival of Senator Hollings**

*We have all agreed that the Supreme Court decision of 1954 is not the law of the land. But everyone must agree that is the fact of the land ... As we meet, South Carolina is running out of courts ... We of today must realise the lesson of one hundred years ago, and move on for the good of South Carolina and our United States. This should be done with dignity. It must be done with law and order.*<sup>1</sup>

Ernest F. Hollings, 9<sup>th</sup> January 1963

In declaring these words to the South Carolina General Assembly, outgoing Governor Ernest 'Fritz' Hollings signalled the beginning of the end for the state's resistance to civil rights.<sup>2</sup> In a bid to avoid the violent protests over the desegregation of the University of Mississippi which had taken place in October 1962, Hollings had overseen the safe enrolment of Clemson University's first black student, Harvey Gantt, and, in contrast to scenes of black protesters subdued by fire hoses and German Shepherds in Birmingham, Alabama, he had ensured the

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<sup>1</sup> Address by Governor Ernest F. Hollings to the General Assembly of South Carolina, 9<sup>th</sup> January 1963, South Carolina Political Collections, Oral History Project, University of South Carolina [http://digital.tcl.sc.edu/cdm/compoundobject/collection/how/id/291/rec/14]; 'Hollings Says Farewell, Sees Desegregation', *The Times-News, Hendersonville, North Carolina*, 10<sup>th</sup> January 1963, p.3.

<sup>2</sup> Francis M. Wilhoit, *The Politics of Massive Resistance* (New York, NY: George Braziller, 1973), p.198; G. McMillan, 'Integration with Dignity', in E.M. Lander, and R.K. Ackerman, *Perspectives in South Carolina History: The First 300 Years* (Columbia, SC: University of South Carolina Press, 1972), pp.381-391; p.389; Walter Edgar, *South Carolina: A History* (Columbia, SC: University of South Carolina Press, 1998), p.538.

maintenance of law and order during South Carolina's sit-in protests.<sup>3</sup> Yet the skill shown by Hollings in preparing South Carolina for a transition to integration 'with dignity' counted for little in the Governor's own career: prevented by state law from running for a second consecutive term as Governor, he had made a bold challenge to Senator Olin D. Johnston's incumbency in the 1962 Democratic Party primary and been thrashed by the veteran Senator, losing all but one of the state's forty-six counties, paying a heavy price for his friendship with the liberal-minded President John F. Kennedy.<sup>4</sup>

This chapter considers the beginning of Fritz Hollings's conservative yet restrained influence on the process of judicial nominations, and how his approach contrasted significantly with Strom Thurmond's open hostility in the state's ongoing war on the Supreme Court. Hollings, following a second, successful, run for the Senate in 1966, would face a serious dilemma over whether or not to support the confirmation of the first African American nominee for the US Supreme Court. Thurgood Marshall was already a nationally-known figure, particularly after his appointment as US Solicitor General by President Lyndon Johnson in 1965. His controversial relationship with the state of South Carolina had already been played out in the courts in the form of *Briggs v. Elliott* and *Brown v. Board of Education*, and also before the Senate Judiciary Committee, where, as explained in the previous chapter, Olin Johnston had provoked universal condemnation for using his seniority to delay President Kennedy's nomination of Marshall to the Second Circuit Court of Appeals.

Significantly, Hollings had been far more closely involved in the events surrounding the *Brown* case than either Johnston or Thurmond. In December 1952, as Speaker of the South Carolina House of Representatives, Hollings had authored the necessary legislation to substantiate Governor James F. Byrnes's pledge to 'equalize' the quality of the state's school system, in order to comply with instructions from the three-judge panel that had presided over the *Briggs*

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<sup>3</sup> Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008), p.76.

<sup>4</sup> 'Sen. Olin Johnston In Landslide S.C. Victory', *Ocala Star-Banner*, 13 June 1962, p.27; 'Voters Show Belief In Sen. Olin Johnston', *The Spartanburg Herald*, 14 June 1962, p.4; Hollings and Victor, *Making Government Work*, p.72.

arguments.<sup>5</sup> Prior to his election as Lieutenant Governor, Hollings had been asked by Byrnes to accompany South Carolina's counsel, John W. Davis, at the *Brown* hearings, during which Davis argued that South Carolina had sufficiently improved the standard of its black schools. Through his involvement in the *Brown* case, Hollings claimed to have developed a friendship with Thurgood Marshall which would last until Marshall's death, aged 84, on 24<sup>th</sup> January 1993. His dilemma over Marshall's Supreme Court nomination, which threatened to alienate his black supporters in South Carolina, serves to illustrate the influence of persistent regional issues on the politics of the US Senate, and, at the same time, the potential consequences for state politics when Senators are forced to make difficult choices in their role in the judicial nominations process.

The Marshall Supreme Court nomination signposted a new phase in South Carolina's crusade against the Court, with Strom Thurmond taking his place on the Senate Judiciary Committee and escalating the Southern attack on any liberal nominee seeking confirmation. From 1967, the task of facing down Dixie would prove to be an even greater physical and emotional ordeal for each nominee, as the Committee hearings continued to showcase not only the ongoing Southern tension over the race question, but also the growing significance of the Supreme Court nomination process in US politics. Although Fritz Hollings aimed to bring South Carolina through a peaceful process of desegregation, his judgement in the nomination of Supreme Court Justices would threaten to jeopardise the liberal record he had achieved as the state's Governor. Thurmond, meanwhile, in his role as chief antagonist, would take the confirmation process out of the judicial realm and into the murky world of personal animosity, once again with the state of South Carolina at the centre of events.

This chapter will highlight the aim of research objective (1) by arguing that South Carolina has played the most important (yet overlooked) role in the development of Supreme Court nomination hearings into political, and confrontational, public events. There will also be an emphasis on research

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<sup>5</sup> Marcia Synnott interview with Ernest F. Hollings, 8<sup>th</sup> July 1980, South Carolina Political Collections, Oral History Project, University of South Carolina [<http://library.sc.edu/scpc/Hollings-Synnott1980.pdf>].



objective (2) in the portrayal of South Carolina as the best example of a state with a political agenda that achieved disproportionate importance on a national scale in the judicial nominations process, while research objective (4) will be evident in the chapter's focus on both Southern political history and Supreme Court nominations – two worlds which have rarely, if ever, been studied together. Beginning with a brief outline of Fritz Hollings's arrival in the Senate following the death of Olin Johnston, this chapter analyses the beginning of Hollings's notably conservative voting record on Supreme Court nominations, while at the same time looking in depth at Strom Thurmond's theatrical performance during the Marshall confirmation hearings. The chapter also considers the adjustment of South Carolina's political leaders to changing circumstances in race relations, with the passage of 1965's Voting Rights Act forcing the state's political establishment to confront the rapid growth of a considerable African American voting bloc.

### **Enter Fritz**

Governor Hollings's dramatic farewell speech to the General Assembly – significant for urging acceptance, rather than condemnation, of the Supreme Court's 1954 ruling that racial segregation in public schools was unconstitutional – led to a great deal of media discussion on the theme of an emerging 'New South'.<sup>6</sup> Earl Mazo noted in *The Charleston News and Courier* that 'Negro enrolment – and turnout on election day – is increasing at a considerably faster rate than the white', due in no small part to Thurgood Marshall's triumph in arguing against the state's white primary system in 1947.<sup>7</sup> *The New York Times* acknowledged the peaceful desegregation of South Carolina's universities, colleges, schools, lunch counters and hotels, with a Professor of Education at South Carolina State College suggesting that many white politicians would welcome the rapidly increasing black

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<sup>6</sup> Anthony J. Badger, 'From Defiance to Moderation: South Carolina Governors and Racial Change', in Anthony J. Badger, *New Deal/New South: an Anthony J. Badger Reader* (Louisville: University of Arkansas Press, 2007), pp.127-143; p.138.

<sup>7</sup> 'Influence of Negro Vote Grows', *The News and Courier*, 17<sup>th</sup> January 1963, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

registration and turnout, as a significant rise in black participation would ultimately relieve them of the burden of running on a racist platform.<sup>8</sup> Yet, despite the relative calm of South Carolina's civil rights protests during the early 1960s, the state's Democratic political establishment remained aware that an enormous increase in Republican votes during the 1962 Senate elections had resulted largely from the appeal of segregationist campaigns waged by W.D. Workman in South Carolina and James D. Martin in Alabama.<sup>9</sup> These unusually strong Republican challenges to long-serving Southern Democrats Olin Johnston and Lister Hill provided much encouragement for the Republican Party in its ongoing effort to win over the Southern states, but the South Carolina Democratic Party would continue to fight for political control of its territory regardless of increasing Republican popularity and growing momentum in the civil rights movement.

For Strom Thurmond, the Republican Party encroachment of the early 1960s presented an altogether more positive set of possibilities. Aware that his base of support comprised a more conservative variety of white voter, Thurmond felt a greater kinship with conservative Republicans such as W.D. Workman and Senator Barry Goldwater of Arizona than the 'liberals, intellectuals, would-be socialists, and bloc-vote appeasers' in the national Democratic Party, whom he had been forced to tolerate since his first election to the Senate.<sup>10</sup> Whereas Johnston and Hollings would spend the remainder of their careers fighting to convince Southerners to stick with the Democratic Party in the face of the other party's gradual and ultimately successful takeover, Thurmond believed that until a Republican such as former Vice President Richard Nixon was sent to the White House, there was simply no hope of ensuring the appointment of reliable conservative judges to the US Supreme Court or any other position in the Federal Judiciary. His sensational defection to the Republican Party in September 1964 ushered in a new era for the state of South Carolina, providing the minority party with an enormously influential figure to spearhead its rapid development into a

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<sup>8</sup> 'South Carolina Shuns Militancy', *The New York Times*, 26<sup>th</sup> October 1963, p.13.

<sup>9</sup> Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction* (Baltimore: Johns Hopkins Press, 1975), p.97-102.

<sup>10</sup> Joseph Crespino, *Strom Thurmond's America* (New York, NY: Hill and Wang, 2012), p.133-4.

formidable electoral force in Southern politics.<sup>11</sup> In maintaining his considerable political following despite the change of party affiliation, Thurmond would become a valuable asset to the Republican election campaigns of Barry Goldwater, Richard Nixon and Ronald Reagan, making a sizeable contribution to the successful long-term Republican effort to convince the South that the Democratic Party no longer represented conservative white interests.<sup>12</sup> As a Republican Senator and a new arrival on the Senate Judiciary Committee, Thurmond would now have the opportunity to oppose liberal judicial nominees on his own terms, without being kept in check by the Southern Democratic caucus.

The defiant stand taken by the South Carolina Democratic establishment did little to convince Thurmond to re-consider his party defection. His failure to see eye-to-eye with national Democratic figures had been quite evident for many years, not least in his refusal to support any Democratic presidential candidate since 1944, and his willingness to defy influential party figures such as Lyndon Johnson and Richard Russell.<sup>13</sup> By complete contrast, Olin Johnston's loyalty to the Democratic Party had paid off handsomely, with the mild-mannered senior Senator achieving even greater seniority on his Senate committees during the early 1960s. A telephone call between Johnston and President Lyndon Johnson on 26<sup>th</sup> December 1963 provides a clear indication of the new President's attitude toward Thurmond's true political allegiance, despite the fact that the call was made nine months before his defection. The fact that the President was happy to defer to Johnston's preferences for two new judicial nominations (rather than Thurmond's choice of his former speechwriter, Robert Figg, now Dean of the University of South Carolina Law School) serves as a reminder of Thurmond's failure to build a productive working relationship with Johnson during the latter's tenure as Senate Majority Leader:

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<sup>11</sup> Jack Bass and Walter DeVries, *The Transformation of Southern Politics* (Athens, GA: University of Georgia, 1995), p.25; p.256; Dewey G. Grantham, *The Life and Death of the Solid South: A Political History* (Lexington, KY: University Press of Kentucky, 1988), p.169; Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction* (Baltimore: Johns Hopkins Press, 1975), p.123; Edgar, *South Carolina*, p.546.

<sup>12</sup> Grantham, *Life and Death*, p.177-8; p.188-9.

<sup>13</sup> Jack Bass and Marilyn W. Thompson, *Strom: The Complicated Personal and Political life of Strom Thurmond* (New York, NY: Public Affairs, 2005), p.156; Crespiro, *Strom Thurmond's America*, p.104.

**LBJ:** They say that you want that Hemphill boy, don't you?  
**Johnston:** Oh yeah, he's alright.  
**LBJ:** Uh, and they, somebody told me you want a fella named Simons.  
**Johnston:** Simons would be alright, uh –  
**LBJ:** They tell me that, that, the Head of the Law School, though, is not too hot.  
**Johnston:** Well, he's not. You can't appoint him.  
**LBJ:** Well, that's who Strom wants. That's who Strom wants appointed.  
**Johnston:** He's too old.  
**LBJ:** Strom wants him appointed.  
**Johnston:** I know.  
**LBJ:** He says he's his number one choice.  
**Johnston:** Yeah, but uh, you'll find with him that, see, they don't appoint usually when they're over sixty.  
**LBJ:** Sixty-two.  
**Johnston:** Is that right?  
**LBJ:** Yeah, that's what the [*indecipherable*] ... but they make exceptions, they made one, they made one in Texas, sixty-four.  
**Johnston:** Oh yeah?  
**LBJ:** But uh, I want, I don't want, I don't want to appoint anybody that you don't want 'cause you're a Democrat.<sup>14</sup>

As a loyal party man, Johnston stood by the President and set out on the campaign trail in the face of growing Republican popularity in the run-up to the 1964 Presidential Election, despite his opposition to that year's Civil Rights Act. However, despite his success in holding back a Republican encroachment into the South during his 1962 Senate campaign, the famous Johnston 'pep talks' proved ineffective in preventing Barry Goldwater from winning South Carolina and the other four states of the Deep South in his unsuccessful presidential bid.<sup>15</sup> Lyndon Johnson's landslide victory over Goldwater provided little consolation for the South Carolina Democratic Party. Johnston's daughter, Liz Patterson, recalls her father's disappointment on election night: 'That broke his heart, when South Carolina went for Goldwater. They have a picture of Daddy from when the results came in, and you can just tell he's really broken-hearted. Daddy campaigned a lot,

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<sup>14</sup> Telephone conversation between Lyndon B. Johnson and Olin D. Johnston, 26<sup>th</sup> December 1963, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (K6312.18) 25 [<http://millercenter.org/scripps/archive/presidentialrecordings/Johnson>].

<sup>15</sup> 'S. Carolina Democrats Seek To Blunt Civil Rights Issue', *The Washington Post, Times Herald*, 7<sup>th</sup> October 1964, p.A7.

but not enough probably.<sup>16</sup> One likely reason for his failure to campaign as vigorously in 1964 was a battle with cancer, which required an operation to remove a carcinoid tumour from his right colon in January 1965.<sup>17</sup> Following a second operation in early April, Johnston received a letter from Senator Edgar A. Brown, in which the leader of the state Senate claimed, 'We have all been greatly concerned about your condition and have been thinking and praying for you throughout this tragic period in your life. Do what the doctors say, get well, and I am sure there are a lot of good years ahead for you.'<sup>18</sup> One week later, Johnston lapsed into a coma and died, aged 68, at Providence Hospital in Columbia, South Carolina.<sup>19</sup>

It was the responsibility of Governor Donald S. Russell to appoint a replacement for Johnston until a special election could be held for South Carolinians to elect a new US Senator. Deciding that he wished to go to the Senate himself, Russell resigned the Governorship and allowed his successor, Robert E. McNair, to appoint him as Johnston's replacement, a move that received a mixed reaction in the state. *The Spartanburg Herald-Journal* reported that while South Carolinians had much respect for Governor Russell, and little doubt about his ability to represent the state in Washington, DC, some eyebrows were raised by the swift and opportunistic manner in which he had seized a Senate seat occupied until recently by one of the state's most popular political figures, particularly as he had done so without consulting Gladys Johnston, widow of the late Senator, and without asking any of Johnston's employees to join his staff.<sup>20</sup> Since his loss to Johnston in 1962, Fritz Hollings had returned to practicing law, but was only too happy to make a political comeback by challenging Russell in the Democratic primary, held on 14<sup>th</sup> June 1966. Having already defeated Russell during the

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<sup>16</sup> Interview with Elizabeth J. Patterson, 29<sup>th</sup> September 2014.

<sup>17</sup> Telephone conversation between Lyndon B. Johnson and Olin D. Johnston, 5<sup>th</sup> January 1965, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6501.01) 6707.

<sup>18</sup> Letter from Edgar A. Brown to Olin D. Johnston, 10<sup>th</sup> April 1965, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390; 'Sen. Johnston Remains Gravely Ill', *The Sumter Daily-Item*, 16<sup>th</sup> April 1965, p.1.

<sup>19</sup> 'Sen. Olin Johnston Dies Of Pneumonia', *Sarasota Herald Tribune*, 19<sup>th</sup> April 1965, p.4.

<sup>20</sup> 'Opinions Mixed About Donald In His Bailiwick'; 'Mrs Johnston Not Consulted', *The Spartanburg Herald-Journal*, 23<sup>rd</sup> April 1965, p.1; 'House, Senate Approve'; 'Russell Becomes a Senator Today', *The Spartanburg Herald-Journal*, 22<sup>nd</sup> April 1965, p.1; Bass and DeVries, *Transformation*, p.261.

gubernatorial race of 1958, Hollings entered into a re-match with relish, believing his opponent to be 'brilliant and accomplished, but he was not a very good politician ... He didn't seem to enjoy mixing it up with the voters. By contrast, I really enjoyed barnstorming the state. I was on a "Fritzkrieg", as *The New York Times* put it.'<sup>21</sup>

One key difference between the 1958 gubernatorial contest and the Senate primary re-match of 1966 was the increase in voter registration among South Carolina's African Americans following passage of the landmark Voting Rights Act of 1965. By 1971, the percentage of voting-age African Americans in South Carolina had more than doubled since 1960.<sup>22</sup> The significance of a growing number of black South Carolinian voters was quite evident in a remarkable debate which took place on 30<sup>th</sup> April 1966 in Orangeburg, during which the Chairmen of the Democratic and Republican parties debated one another at the predominantly black South Carolina State College. In reporting the event, *The New York Times* claimed that the Goldwater campaign, and the defection of Thurmond to the Republican Party, would ensure black support for the Democrats in that year's elections, but ultimately, 'the Democrats' assurance and the Republicans' concession that most Negroes will vote Democratic this year focuses both parties' attention on white voters, who still make up 80 per cent of the electorate.'<sup>23</sup>

To ensure white conservative support in his challenge to Donald Russell, Hollings arranged for his supporters to distribute a photograph of Russell shaking hands with black civil rights leader Reverend I. DeQuincey Newman as a means of damaging Russell's credibility as a segregationist. Unknown to most white South Carolinians was the fact that Newman and Hollings were friends, and that Newman had given Hollings the photograph to use in his campaign, employing his usual tactic of backing the more moderate candidate during the primary

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<sup>21</sup> Frank E. Jordan, *The Primary State: A History of the Democratic Party in South Carolina, 1896-1962* (self-published; unknown date), p.49; Hollings and Victor, *Making Government Work*, p.116; 'S. Carolina To Vote After Dull Campaign', *The Washington Post-Times Herald*, 13<sup>th</sup> June 1966, p.A8.

<sup>22</sup> James C. Cobb, 'From the First New South to the Second: The Southern Odyssey through the Twentieth Century', in Craig S. Pascoe et al, *The American South During the Twentieth Century* (Athens, GA: University of Georgia Press, 2005), pp.1-15; p.6-7.

<sup>23</sup> '2 Parties Court Carolina Negro', *The New York Times*, 1<sup>st</sup> May 1966, p.61.

elections.<sup>24</sup> In taking full advantage of the discontent felt by many over Russell's 'self-appointment', Hollings's 'Fritzkrieg' proved enormously popular, and he scored a convincing victory over Russell to become the Democratic Party's nominee for the special Senate election, winning by 196,405 votes to Russell's 126,595.<sup>25</sup> In the special election, held on 8<sup>th</sup> November 1966, Hollings managed to defeat a strong challenge from Republican Marshall Parker to become South Carolina's choice to replace Olin Johnston, in a victory of 223,790 to 212,032 votes.<sup>26</sup>

Republicans may have failed to solidify the white vote in South Carolina, but the party did succeed, unwittingly, in unifying black voters behind the Democratic ticket.<sup>27</sup> With black South Carolinians now accounting for an estimated 20 per cent of the voting turnout in 1966, the need for Fritz Hollings to continue developing his skills in winning over black voters while at the same time maintaining sufficient segregationist credentials to secure white conservative support would only continue, offering a useful illustration of James C. Cobb's view that, during the mid-to-late 1960s, Southern politicians 'walked a tightrope in trying to convince white voters that their interests remained paramount' in order to overcome the concerns of some whites that the region's politicians were becoming too attentive to the growing black vote.<sup>28</sup>

### **Strom Warning**

The likelihood of Strom Thurmond mellowing as he reached sixty years of age was reduced considerably by a string of Supreme Court decisions during the 1960s. While many of the more controversial opinions handed down by the Justices since the 1940s – notably, *Smith*, *Brown* and *Baker* – were condemned by Southerners

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<sup>24</sup> Badger, 'From Defiance', p.136.

<sup>25</sup> 'Senator Russell Loses In S.C.', *Eugene Register-Guard*, 15<sup>th</sup> June 1966, p.4A

<sup>26</sup> Hollings and Victor, *Making Government Work*, p.131.

<sup>27</sup> Bartley and Graham, *Southern Politics*, p.125; Bass and DeVries, *Transformation*, p.255.

<sup>28</sup> James C. Cobb, *The South and America Since World War II* (Oxford: Oxford University Press, 2012), p.115; Bartley and Graham, *Southern Politics*, p.125.

for threatening the 'Southern' way of life, the 1960s saw the Supreme Court tackle a series of cases dealing with the state of South Carolina specifically, including *Edwards v. South Carolina* (1963) and *Bouie v. City of Columbia* (1964), both of which upheld the rights of protesters in the state capital, in addition to *South Carolina v. Katzenbach* (1966), which nullified the state's challenge to the 'pre-clearance' provisions of the Voting Rights Act.<sup>29</sup> It is unlikely that Thurmond was consoled by an emerging conservative trend on the part of Justice Hugo Black, historically one of the more liberal members of the Court. Having already dissented in *Bouie v. City of Columbia*, Black – a native of Alabama who received death threats for 'betraying' the South through his role in *Brown* – dissented once again in the *Katzenbach* case, viewing as patronising the inclusion in the VRA of a provision which empowered the Federal Government to approve Southern voting registration procedures.<sup>30</sup> The South's attempt to resist the VRA failed, and, as one study has argued, 'the increased African American voter registration and turnout almost immediately eliminated the white supremacist rhetoric that had been a hallmark of the state's political leaders.'<sup>31</sup> In time, even the likes of Strom Thurmond would be forced to make concessions to the state's growing African American voting bloc.

The on-going Southern effort to curb the power of the Supreme Court continued to appear in the correspondence between South Carolinian voters and their Senators. Within one month of taking office, Fritz Hollings was reminded of the passionate South Carolinian desire to curb the power of the Court in various letters sent to his office, to which he responded, 'there are currently many bills under consideration by the 90<sup>th</sup> Congress to restrict the power of the Supreme Court, and I intend to look these bills over carefully with an eye towards revising

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<sup>29</sup> Orville Vernon Burton et al, 'South Carolina', in Chandler Davidson and Bernard N. Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, NJ: Princeton University Press, 1994), pp.191-232; p.191-2; James O. Farmer, 'Memories and Forebodings: The Fight to Preserve the White Democratic Primary in South Carolina', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.243-251; p.244.

<sup>30</sup> McKenzie Webster, 'The Warren Court's Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations', *Journal of Law and Politics* 17 (2001), pp.373-407, p.394; Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York, NY: Riverhead, 2007), p.406-1.

<sup>31</sup> Burton et al, 'South Carolina', p.215.



the Supreme Court to a greater degree of efficiency and curtailing the number of poor decisions which have recently been handed down.’<sup>32</sup> Thurmond, in a letter sent a few days after the announcement of *Katzenbach*, complained to a constituent of the failure of his frequent attempts to introduce a judicial qualification bill in Congress. He claimed he would now sponsor a constitutional amendment to create a ‘Court of the Union’, to be composed of the Chief Justices of the highest courts of all fifty states, which ‘would be empowered to hear and determine cases of appeal from the Supreme Court which affect the rights reserved to the states or to the people.’<sup>33</sup> Despite the strong likelihood of this idea being blocked, as with all of his previous attempts to restrict the power of the nine Justices, Thurmond had lost none of his rage. Having become South Carolina’s senior Senator following Johnston’s death, he would now adopt a more militant approach in his war on the Court by using his position on the Judiciary Committee.

In his new strategy, Thurmond would encounter one of his biggest obstacles in Lyndon Johnson, a Southern President with a clear legislative agenda aimed at improving civil rights for African Americans. Unlike most Presidents, who have made nominations to the Supreme Court upon the death or retirement of a serving Justice, Johnson was happy to simply create his own vacancies. During the summer of 1965, he persuaded Justice Arthur J. Goldberg to accept the position of US Ambassador to the United Nations as a means of creating a space on the Court for his close friend and confidant, Abe Fortas.<sup>34</sup> Thanks to the Justice Department’s very business-like preparation of nominees for facing the tough questions offered regularly by Southerners on the Judiciary Committee, Fortas sailed through his confirmation hearings.<sup>35</sup> In praising the nominee for winning unanimous approval from the Committee, Johnson told Fortas by telephone, ‘I

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<sup>32</sup> Letter from Ernest F. Hollings to Tunis Harber, 10<sup>th</sup> February 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Supreme Court.

<sup>33</sup> Letter from Strom Thurmond to T.K. Mowbray, 22<sup>nd</sup> January 1965, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 4-1 Supreme Court Year 1965, Box 5, Folder 1.

<sup>34</sup> David A. Yalof, *Pursuit of Justices* (Chicago, IL: University of Chicago Press, 1999), p.82.

<sup>35</sup> Telephone conversation between Lyndon B. Johnson and Nicholas Katzenbach, 6<sup>th</sup> August 1965, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6508.02).

want to congratulate you. Damned if you don't show them all up.'<sup>36</sup> The close friendship between Johnson and Fortas appeared to raise no alarm bells among Southern Democrats, who offered no resistance to the nomination. The opposition of Strom Thurmond, whose public comments on Fortas suggested an intense personal dislike of the nominee, was joined by only Carl Curtis of Nebraska and John J. Williams of Delaware.<sup>37</sup> As with his unexplained opposition to President Kennedy's nomination to the Court of Arthur Goldberg three years earlier, it seemed that Thurmond was prepared to oppose any nominee who did not express a clear willingness to uphold the autonomy of the states, offering in support a track record of legal hostility toward civil rights. Cynics might even have concluded that Thurmond's opposition during this period was guaranteed to any nominee failing to express this willingness in a Deep South accent. With Abe Fortas now on the Supreme Court, Thurmond had lost the battle but not the war. As will be shown in Chapter Five, he would get another chance to face down his nemesis.

### **A Coloured Man with the Name of Marshall**

While President Johnson was able to put Abe Fortas on the Court as a long-term means of protecting his Great Society programmes, his plan to appoint the first African American Supreme Court Justice was, in itself, a long-term project. David A. Yalof has argued that Johnson appointed Thurgood Marshall as Solicitor General in 1965 as a first step in getting him onto the Supreme Court, yet Johnson denied any connection with a future appointment.<sup>38</sup> Bob Woodward and Scott Armstrong have claimed that the President persuaded Marshall to take the position of Solicitor General by telling him, 'I want folks to walk down the hall at

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<sup>36</sup> Telephone conversation between Lyndon B. Johnson and Abe Fortas, 10<sup>th</sup> August 1965, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6508.03).

<sup>37</sup> Bass and Thompson, *Strom*, p.199.

<sup>38</sup> Yalof, *Pursuit*, p.87.

the Justice Department and look in the door and see a n\*\*\*\*\* sitting there.’<sup>39</sup> As with the carefully-engineered vacancy left by Arthur J. Goldberg’s move to the United Nations, Johnson was able to create another vacancy for a new Supreme Court Justice only two years later. His promotion of Ramsey Clark to the post of US Attorney General would create a serious conflict of interest, in that Clark’s father was a serving Supreme Court Justice. As the President hoped, the appointment of the younger Clark as head of the Justice Department forced Justice Tom C. Clark’s retirement, allowing another convenient space for Johnson to fill on the Supreme Court.<sup>40</sup>

When news broke of Justice Clark’s retirement, Strom Thurmond wrote a letter to the President, requesting that he give ‘earnest consideration to filling the impending vacancy on the Supreme Court with an appointee who has had prior judicial experience, preferably at the trial level.’ Regardless of whether or not Johnson interpreted the letter as a thinly-veiled Southern warning against appointing Thurgood Marshall, he would most likely have been amused by Thurmond’s next paragraph, in which he stated, ‘I realise that appointments to the Supreme Court are entirely within the prerogative of the President of the United States, and I hope you will not construe this letter as interference in that domain. It is meant only as a friendly suggestion.’<sup>41</sup> At a press conference on 13<sup>th</sup> June 1967, the President made no attempt to disguise his pride in nominating Thurgood Marshall to replace Tom Clark, declaring, ‘I believe it is the right thing to do, the right time to do it, the right man, and the right place.’<sup>42</sup>

Marshall had gone to South Carolina to argue against segregated schools in 1951, and ended up changing the course of history with the *Brown* case in 1954. He had successfully faced down South Carolina’s Olin Johnston on his way to the Second Circuit Court of Appeals, and ended up becoming the nation’s first African

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<sup>39</sup> Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961-1973* (Oxford: Oxford University Press, 1998), p.232; Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon and Schuster, 1979), p.52.

<sup>40</sup> Yalof, *Pursuit*, p.88-89.

<sup>41</sup> Letter from Strom Thurmond to President Lyndon Johnson, 2<sup>nd</sup> March 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Nominations, Year 1967, Box 26, Folder 1.

<sup>42</sup> Barbara A. Perry, *A ‘Representative’ Supreme Court? The Impact of Race, Religion and Gender on Appointments* (London: Greenwood Press, 1991), p.100; Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (Macon, GA: Mercer University Press, 1995), p.388; Yalof, *Pursuit*, p.90.

American Solicitor General. Strom Thurmond, now the voice of South Carolina on the Senate Judiciary Committee, was determined to make Marshall's journey to the US Supreme Court as difficult and uncomfortable as possible. Responding immediately to the President's announcement, the Senator complained that 'this appointment to the Supreme Court will unquestionably tip the scales overwhelmingly in favour of the so-called liberal viewpoint on the Court.'<sup>43</sup> He elaborated on this argument in letters to his constituents, telling a married couple from Florence, South Carolina, that 'in many instances on basic constitutional questions, the vote is now 5 to 4 for the liberal viewpoint. The Justice that Marshall is being named to replace is usually found voting with the 4 on issues of this nature, and I fear that the appointment of Marshall will make the future line-up to be 6 to 3. This means that it will require two conservative appointments before Court decisions will reflect true adherence to both the letter and the spirit of the Constitution.'<sup>44</sup>

In his correspondence during the summer of 1967, Thurmond maintained the argument that Marshall would provide one extra liberal vote on the Court with his 'completely erroneous' interpretation of the Constitution.<sup>45</sup> His responses to constituents during the month of June often included a statement acknowledging similarity between the correspondent's views and his own, such as 'I am glad that you agree with my observations'; 'I am pleased to know of your agreement with me' or 'I am very glad that we are in agreement on this issue'.<sup>46</sup> However, his statements of agreement began to disappear from his responses in late June, when some of the letter-writers adopted an overtly racist message. These included a New Yorker who expressed hope that the Senator would 'VOTE

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<sup>43</sup> News release from the office of Senator Strom Thurmond, 13<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Marshall, Thurgood.

<sup>44</sup> Letter from Strom Thurmond to Mr and Mrs Ed Hall, 15<sup>th</sup> June 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, Nominations, Year 1967, Box 26, Folder 1.

<sup>45</sup> News release from the office of Senator Strom Thurmond, 13<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>46</sup> Letter from Strom Thurmond to Mr and Mrs Guy H. Rouse, 20<sup>th</sup> June 1967; letter from Strom Thurmond to Mr J.N. Frank, 20<sup>th</sup> June 1967; letter from Strom Thurmond to Edward R. Cusick, 23<sup>rd</sup> June 1967; letter from Strom Thurmond to D.E. Burns, 27<sup>th</sup> June 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 1.

NO ON THE SEATING OF A NEGRO TO THE SUPREME COURT'; a Washington, DC resident who considered the Marshall nomination 'an INSULT to every white citizen in the US!'; a South Carolinian who asked, 'is there such a dearth of white lawyers in the US (qualified ones) that we come to this?' and also a Texan correspondent, wondering what the Court will become 'with a n\*\*\*\*\* there', adding her view that 'the white man does not owe the n\*\*\*\*\* one cotton pickin' thing.'<sup>47</sup> To each of these messages, Thurmond expressed only his appreciation of the writer's views, and an assurance of his opposition to the nomination.

The only occasion on which Thurmond acknowledged agreement with an openly racist letter was his response to New York-based 'research historian' Edward R. Cusick, who wrote to the Senator on 13<sup>th</sup> and 26<sup>th</sup> June to argue that the masonic lodge to which Thurgood Marshall belonged was 'an illegitimate and clandestine Grand Lodge.' Addressing the Senator as 'Brother Thurmond', Cusick pointed out that fellow 'regular' Masons included Southern Senators John Stennis of Mississippi and Sam Ervin of North Carolina, in addition to former South Carolina Governor and Senator, Donald Russell. In mentioning the retirement of 'Brother Thomas Clark', Cusick referred to the long history of a masonic presence on the Supreme Court: 'To think a coloured man with the name of Marshall who is a clandestine may sit on the bench which was so glorified and honoured as it was by Brother John Marshall!'<sup>48</sup> Noting Thurmond's listing in the *Royal Arch Mason* magazine as a member of a 'regular' masonic fraternity, Cusick requested that he inform other Masons in the Senate of Marshall's membership of one of the 'coloured or Negro' lodges which were condemned in 1898 by The Grand Lodge of South Carolina. To emphasise his concern, Cusick enclosed a bulletin entitled 'Important for Regular Masons!', which pointed out that 'none of the 40 regular Masonic Grand Lodges in the United States, all being recognised by the Mother Grand Lodge of England, has ever extended any recognition to any of the coloured

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<sup>47</sup> Letter from John R. Buch to Strom Thurmond, 20<sup>th</sup> June 1967; letter from Frank P. Stelling to Strom Thurmond, 20<sup>th</sup> June 1967; letter from R.C. Moore to Strom Thurmond, 15<sup>th</sup> July 1967; letter from Carrie Pauley Stevenson to Strom Thurmond, 15<sup>th</sup> July 1967; Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folders 1-2.

<sup>48</sup> Letters from Edward R. Cusick to Strom Thurmond, 13<sup>th</sup> and 26<sup>th</sup> July 1967; Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court), Year 1967, Box 26, Folder 2.

or Negro Grand Lodges in the United States,’ adding ‘(PLEASE let other regular Masons read this).’<sup>49</sup> Whether or not Thurmond discussed the issue of Marshall’s ‘illegitimate’ masonic affiliation with his ‘brothers’ in the Senate is not known, but it is significant that he would openly express agreement with Cusick’s argument when failing to acknowledge agreement with other racist sentiments expressed to him in letters during this period.

Meanwhile, some very different letters were arriving at the office of South Carolina’s junior Senator. One particularly remarkable aspect of the Marshall Supreme Court controversy that has not been documented in the current literature is the fact that, throughout his confirmation hearings, Marshall maintained a written correspondence with Fritz Hollings. Knowing that he would have to vote for or against the nominee following the close of the hearings, Hollings wrote to Marshall on 19<sup>th</sup> June 1967, telling him that ‘early this morning the Reverend Martin Luther King stated on television that he believed it was the citizen’s moral right and duty to violate laws that he believed were unjust. I would appreciate you letting me know your agreement or disagreement with this statement or belief.’<sup>50</sup> Marshall provided a detailed response:

Dear Senator Hollings:

You ask whether I agree with the statement that ‘it was the citizen’s moral right and duty to violate laws that he believed were unjust.’ That proposition misconceives, I believe, the nature of our ‘government of laws and not of men.’ I believe that in our democratic society the ways to challenge an unjust law are (1) by intelligent use of the vote in order to spur elected officials to change the law, and (2) by action in the courts if its validity is doubtful. In sum, the citizen has a fundamental duty not to disobey the law while seeking to accomplish desired change through normal political and legal processes.

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<sup>49</sup> ‘Important for Regular Masons!’ bulletin, undated [letter from Edward R. Cusick dated 26<sup>th</sup> June 1967], Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 1.

<sup>50</sup> Letter from Fritz Hollings to Thurgood Marshall, 19<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

This does not mean that I discount the value of dissent. It was the design of the Framers that there should be no impairment of the rights of speech and assembly, and the responsible exercise of those First Amendment rights provides an avenue to peaceful change. But I cannot accept the view – implicit in the statement you asked me to comment upon – that any man stands above or beyond the law.

I appreciate this opportunity to express my views.

Sincerely  
Thurgood Marshall<sup>51</sup>

Perhaps because this first letter did not satisfy him, or perhaps because Marshall's candour led him to ask more specific questions, Hollings turned to the subject of recent Supreme Court decisions in his next letter. Despite not being a member of the Judiciary Committee, Hollings had more compelling reasons than other freshman Senators to investigate Marshall's nomination, particularly given the very careful balancing act which he had performed as Governor by appearing conservative on civil rights while at the same time guiding South Carolina through a peaceful process of desegregation. His next letter would highlight the importance of the Supreme Court's power in the minds of South Carolinian voters, particularly with regard to the impact of recent Court decisions relating to crime and punishment:

Dear General Marshall:

I do not mean to besiege you with letters or pre-empt your hearings before the Judiciary Committee but in that I am not a member of the Committee, I would appreciate your letting me know whether or not you agree with the philosophy of the majority opinion in the following cases:

1. Miranda vs. State of Arizona – June, 1966
2. Walker vs. City of Birmingham – June, 1967
3. Reitman vs. Mulkey – May, 1967
4. Berger vs. State of New York – June, 1967

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<sup>51</sup> Letter from Thurgood Marshall to Ernest 'Fritz' Hollings, 20<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

It is quite apparent with the recent trend of the Court, a man's competence as an attorney should not only be weighted but also his basic concept of the Constitution. I respect your ability as an attorney and in addition to my first inquiry of June 19, I would also appreciate your response to this.

Sincerely  
Ernest F. Hollings<sup>52</sup>

Marshall was less forthcoming in his next response. In refusing to comment on specific cases due to a likelihood of the issues involved in those four cases returning to the Supreme Court, Marshall highlighted a pattern that would re-emerge frequently during his confirmation hearings:

Dear Senator Hollings:

I apologise for not responding sooner to your letter of June 21; I was out of town over the weekend.

I am sure you will understand when I say that you place me in a difficult position by asking me if I agree with the majority opinions in some recent cases. Should I become a member of the Court, I would of course be called upon to pass [*sic*] on similar issues to those decided in the cases you cite, and indeed, to determine the application of those cases. Therefore, I think it would be improper for me to express specific agreement or disagreement with specific cases.

I have, however, enclosed the briefs for the United States in Westover v. United States (a companion case to Miranda), Walker v. City of Birmingham, and Reitman v. Mulkey.

Sincerely  
Thurgood Marshall  
Solicitor General<sup>53</sup>

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<sup>52</sup> Letter from Ernest 'Fritz' Hollings to Thurgood Marshall, 21<sup>st</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>53</sup> Letter from Thurgood Marshall to Ernest 'Fritz' Hollings, 27<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.



Ultimately, Marshall's second response provided Hollings with the ammunition he required to justify voting against confirmation. While he may have struggled to reach a decision during the week following Johnson's announcement, the existence of a draft of a speech, dated 20<sup>th</sup> June 1967, suggests that Hollings was preparing himself to justify his reasons for opposition at least three weeks prior to the commencement of confirmation hearings, and at least two months before the nomination would reach the Senate floor. The speech contains his confession that 'when the President recommended Marshall for the United States Supreme Court this week, I thought it was a good opportunity to vote for a competent Negro ... But I hesitated.' After mentioning his correspondence with the nominee, Hollings declared that 'it is obvious from his answers that Mr Marshall has no idea of restricting himself to interpreting the Constitution and statutory law. Rather, he, like some of the other brethren on the Court, [is] prepared to re-write the Constitution. I think this is one of the greatest dangers facing the Republic and while I was prepared to vote for him on other scores, he flunked the main exam. I voted no.'<sup>54</sup>

Hollings was able to use his correspondence with Marshall as a means of assuring his supporters that he was taking the nomination very seriously. Despite having declared 'I voted no' in a draft of a speech dated 20<sup>th</sup> June, he claimed in a response to a constituent from Bishopville, South Carolina, dated 29<sup>th</sup> June, that, 'before I make a final decision, I want to make certain that [Marshall's] philosophy does not conform with some of the recent opinions of the Court, and particularly the recommendation of anarchy by Martin Luther King. Rather than awaiting the Committee hearings, I have written directly to the Solicitor General, and my vote will depend on his response and the Committee hearings.'<sup>55</sup> At the same time, the Senator seemed reluctant to tell his constituents that he had known Marshall for many years. An earlier draft of the letter to the Bishopville resident, dated 23<sup>rd</sup>

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<sup>54</sup> Draft of speech dated 20<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>55</sup> Letter from Ernest 'Fritz' Hollings to E.B. Woodward, 29<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

June, includes the statement, 'I stated to the press that I knew Mr Marshall to be a competent attorney because I had tried cases against him', but this line had been removed by the time the letter was sent to the constituent six days later.<sup>56</sup>

The argument in favour of Hollings casting a dissenting vote was laid before him in a letter from fellow Charlestonian and former state Senator Huger Sinkler, dated 20<sup>th</sup> June 1967 – the same day on which the Senator drafted his comments regarding his 'hesitation'. Sinkler claimed to be 'seriously concerned about the effect that a favorable vote [for Marshall] would have on your race in 1968 ... the sure way to beat you is to tie you with Johnson, and an issue of this sort would be just what your opposition is looking for. I have talked to several of your friends on this subject and I think definitely the consensus share my views.' Sinkler advised that 'you don't have to be extreme about it and your decision can rest on the solid ground of qualifications and philosophy. Perhaps this is what your inquiry into Marshall is intended to develop but in any event, it is my judgment that a vote for Marshall would have a serious effect upon your race in 1968.'<sup>57</sup>

Sinkler's argument seemed logical given the nature of the expanding Southern electorate. Despite the surge in African American voter registration from 1965, Earl Black and Merle Black have pointed out that, throughout the 1960s, 'three new whites were enrolled in the Deep South for every two new blacks', offering a range of compelling reasons for Southern whites to vote in greater numbers, including rising levels of education, greater party competition, the politicisation of working class white women, and, possibly, a measure of racist counter-mobilisation.<sup>58</sup> Although the Voting Rights Act succeeded in triggering the creation of a greatly expanded black Southern electorate, the impact of the 'black vote' was ultimately blunted by an equally impressive increase in white voter

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<sup>56</sup> Draft of letter from Ernest 'Fritz' Hollings to E.B. Woodward, 23<sup>rd</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>57</sup> Letter from Huger Sinkler to Ernest 'Fritz' Hollings, 20<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>58</sup> Earl Black and Merle Black, *Politics and Society in the South* (Cambridge, MA: Harvard University Press, 1989), p.139-40.

registration, which would ensure the survival of a sizeable white voting majority in South Carolina.

Whether Hollings genuinely hoped that his correspondence with Marshall would convince him to support the latter's confirmation, or whether he hoped to use the correspondence simply as a means of sticking to his original position of dissent, the Sinkler letter outlines the position which the Senator would ultimately adopt. It would be left to the growing number of South Carolina's black voters to decide whether or not they would be as sympathetic to Hollings's position as his friends in the conservative political establishment.

### **The Other Man From Maryland**

As Fritz Hollings continued to assure his constituents that he would cast a responsible vote on the Marshall nomination, Judiciary Committee member Sam Ervin of North Carolina was ordering his staff to begin researching Marshall's background, while Strom Thurmond prepared a multitude of obscure questions in a bid to test, and, wherever possible, ridicule, the nominee's legal knowledge.<sup>59</sup> When Marshall's hearings commenced, on 13<sup>th</sup> July 1967, it was John McClellan of Arkansas who took the lead in interrogating the nominee, with most of his questions relating to the landmark *Miranda v. Arizona*, one of the four cases cited by Fritz Hollings in his second letter to Marshall. With the *Miranda* decision, the Supreme Court, by a five-to-four margin, had ruled that evidence used in a criminal prosecution would be considered inadmissible if the defendant was not made aware of a constitutional right to an attorney and a right against self-incrimination, with a firm acknowledgment of the defendant's understanding of those rights. McClellan made clear at the outset that his questions 'do not go to the legal ability or training of the nominee, but they do deal with a critical condition in this country', namely the problem of crime and disorder in the

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<sup>59</sup> Juan Williams, *Thurgood Marshall: American Revolutionary* (New York, NY: Random House, 1998), p.336; Crespino, *Strom Thurmond's America*, p.215.

streets.<sup>60</sup> In responding to McClellan's questions regarding his position on the *Miranda* ruling, Marshall maintained, as in his correspondence with Hollings, that he was not able to give his views on matters which would soon be under consideration by the courts.<sup>61</sup> McClellan eventually became agitated by Marshall's refusal to provide a straight answer:

**Senator McClellan:** Do you subscribe to the philosophy that the Fifth Amendment right to assistance of counsel requires that counsel be present before the police can interrogate the accused?

**Judge Marshall:** That is part of the *Miranda* rule.

**Senator McClellan:** Yes.

**Judge Marshall:** And as I say, I can't comment, because it is coming back up.

**Senator McClellan:** I have to wonder, from your refusal to answer, if you mean the negative.

**Judge Marshall:** Well, that is up to you, sir. But I have never been dishonest in my life.

**Senator McClellan:** I did not say that. But you lead me to wonder why I cannot get the answer.<sup>62</sup>

Senator Philip Hart of Michigan, who had defended Marshall throughout his troubled Second Circuit confirmation hearings in 1962, made the first of many interjections, and took the opportunity to make a supportive statement of the nominee for the record.<sup>63</sup> Hart and other Marshall supporters would have cause to interject over several days of hearings. On 14<sup>th</sup> July, Marshall went head-to-head with North Carolina's Sam Ervin, who was distinctly unimpressed by the nominee's description of the US Constitution as a 'living document'. In taking up McClellan's *Miranda*-based attack, Ervin pressed Marshall on the original meaning of the words in the US Constitution, making specific reference to the wording of the Fifth Amendment. Recognising this line of questioning as simply another means of probing his views on the *Miranda* decision, Marshall stuck to his original

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<sup>60</sup> Hearings Before the Committee of the Judiciary, United States Senate, Ninetieth Congress, First Session on Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court, printed for the use of the Committee on the Judiciary, U.S. Government Printing Office (1967), 13<sup>th</sup> July 1967, p.3.

<sup>61</sup> Williams, *Thurgood Marshall*, p.334.

<sup>62</sup> Hearings, 13<sup>th</sup> July 1962, p.13.

<sup>63</sup> *Ibid.*, p.13.

line of defence by asserting that he was unable to comment on issues which were due back for review in the Supreme Court. Eventually, Ervin felt it necessary to address Marshall's evasiveness with a direct reference to the potential negative consequences of the hearings:

**Senator Ervin:** I will tell you, Judge, if you are not going to answer a question about anything which might possibly come before the Supreme Court some time in the future, I cannot ask you a single question about anything that is relevant to this inquiry.

**Judge Marshall:** All I am trying to say, Senator, is I do not think you want me to be in the position of giving you a statement on the Fifth Amendment, and then, if I am confirmed and sit on the Court, when a Fifth Amendment case comes up, I will have to disqualify myself.

**Senator Ervin:** If you have no opinions on what the Constitution means at this time, you ought not to be confirmed. Anybody that has been at the bar as long as you have, and had as distinguished a legal career as you have, certainly ought to have some very firm opinions about the meaning of the Constitution.

**Judge Marshall:** But as to particular language of a particular section that I know is going to come before the Court, I do have an opinion as of this time. But I think it would be wrong for me to give that opinion as of this time. When the case comes before the Court, that will be the time. I say with all due respect, Senator, that is the only way it has been done before.<sup>64</sup>

The style of questioning employed by Senators Ervin and McClellan during the Marshall Supreme Court hearings demonstrates usefully the Southern tactic of trying to expose a nominee's sympathy with liberal Supreme Court decisions by pushing them into debates over the wording of various sections of the US Constitution. Given Marshall's refusal to answer a specific question on *Miranda*, Ervin continued to press him on the wording of the Fifth Amendment, which includes a specific provision, relevant to the *Miranda* ruling, that no person 'shall be compelled in any criminal case to be a witness against himself.'<sup>65</sup> While Ervin insisted that he was not asking Marshall to comment on any particular case which had come before the Court, and claimed that he was merely questioning the

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<sup>64</sup> Hearings, 14<sup>th</sup> July 1967, p.53-4.

<sup>65</sup> F.G. Cullop, *The Constitution of the United States: an introduction*, (New York, NY: Penguin Group, 1969), p.104.

nominee's views on the wording of a particular section of the Constitution, Marshall eventually made light of Ervin's tactics and re-asserted that he was not in a position to comment on any issues likely to come before the Court in the future:

**Senator Ervin:** Judge, how can the words 'no person shall be compelled in any criminal case to be a witness against himself', apply to anything except testimony given in a court?

**Judge Marshall:** I would say, Senator, that we know, you and I, that you are talking about a matter which was in the Miranda cases, and there will be many more cases dealing with the Miranda ruling and the use of confessions. Those cases are now in the Supreme Court or on their way to the Supreme Court.

**Senator Ervin:** Well, Judge, I would respectfully suggest that I am talking about fifteen words which have been in the Constitution since June 15, 1790. Am I to take it that you are unwilling to tell me what you think those words, which have been in the Constitution since 1790, mean?

**Senator Hart:** Would the Senator yield just briefly?

**Senator Ervin:** Yes.

**Senator Hart:** It would be interesting to know from the record how many cases have been litigated since 1790 over those very fifteen words. It would be an enormously long hearing.

**Senator Ervin:** Yes, sir.

**Judge Marshall:** It certainly would.<sup>66</sup>

Despite the fact that the Southern tactic clearly held no credibility with Senator Hart and others, it did at least allow Southern Senators the opportunity to portray the nominee's refusal to answer questions on specific cases as a refusal to answer questions on the wording of the US Constitution. In offering the claim that the nominee before them appeared to have no views on what the Constitution means, Southern Senators were also making the unspoken accusation that the nominee would not adhere to the basic principles of that document if confirmed. In the event, Ervin not only implied his reluctance to confirm Marshall, but also pointed out that he had received more straightforward answers from Potter Stewart during the latter's tense 1959 hearings.<sup>67</sup> By the end of the second day, Marshall had already received indications from both McClellan and Ervin that

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<sup>66</sup> Hearings, 14<sup>th</sup> July 1967, p.54.

<sup>67</sup> *Ibid.*, p.56.

neither would approve his appointment, with the former complaining of a lack of sufficient information to confirm, and the latter criticising Marshall for apparently having no views on the wording of the Constitution.<sup>68</sup> Meanwhile, Strom Thurmond remained silent, and continued to remain silent throughout a third day of hearings, held on 18<sup>th</sup> July, during which Ervin questioned Marshall on issues relating to the Voting Rights Act, including the Supreme Court's *Katzenbach* case.<sup>69</sup>

The Committee reconvened for a further session on 19<sup>th</sup> July, which opened with a remarkable exchange between Thurgood Marshall and Chairman James Eastland of Mississippi, who added an even stronger Southern flavour to the hearings:

**The Chairman:** Now, you have been in a lot of institutions in the Southern states.

**Judge Marshall:** Yes, sir.

**The Chairman:** Are you prejudiced against white people in the South?

**Judge Marshall:** Not at all. I was brought up, what I would say, way up South in Baltimore, Maryland. And I worked there for white people all my life until I got into college. And from there most of my practice, of course, was in the South, and I don't know, with the possible exception of one person that I was against in the South, that I have any feeling about them.

**The Chairman:** Now, if you are approved, you will give people in that area of the country, and the states in that area of the country, the same fair and square treatment that you give people in other areas of the country?

**Judge Marshall:** No question whatsoever.

**The Chairman:** Senator Thurmond.

**Senator Thurmond:** Thank you, Mr Chairman.<sup>70</sup>

With Eastland handing over to Strom Thurmond, the hearings took an extraordinary turn, resulting in one of the most unique confrontations in the history of the Supreme Court confirmation process. Having prepared thoroughly for the hearings, Thurmond would unleash an arsenal of carefully-worded and mind-bogglingly complex questions, which would build in intensity in a sustained

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<sup>68</sup> Williams, *Thurgood Marshall*, p.335.

<sup>69</sup> Hearings, 18<sup>th</sup> July 1967, p.66.

<sup>70</sup> Hearings, 19<sup>th</sup> July 1967, p.160-1.

effort to frustrate and confuse the nominee. Beginning with a fairly straightforward line of inquiry, Thurmond asked Marshall if he knew who had drafted the Thirteenth Amendment, despite the fact that the Thirteenth Amendment did not constitute a significant part of any case which Marshall had ever been involved in.<sup>71</sup> While it was clearly the case that an advanced level of legal expertise was required in order to satisfy Thurmond, it was apparent from the very first question that the relevance of each topic he opted to raise was at best questionable with regard to the nominee's suitability for a seat on the Supreme Court.

The Senator turned to the question of the constitutionality of the Civil Rights Act of 1866 prior to the ratification of the Fourteenth Amendment. With Marshall maintaining that he had not researched, nor been called upon to research, any of these issues since the early 1950s, Thurmond proved relentless, moving swiftly from a discussion of theories prevalent in the Republican Party during the 1860s regarding the constitutionality of the 1866 Act, to a question regarding the significance of Congress copying the Act's enforcement provision from the fugitive slave law of 1850.<sup>72</sup> Whatever his concern may have been over Marshall's suitability, it is significant that none of the questions related to the nominee's experience or judicial background. When a law professor from the University of Alabama wrote to Thurmond following the conclusion of the hearings, to request material on Marshall's work on civil rights cases, the Senator admitted that such material was not included in the preparation he had done in advance of the hearings.<sup>73</sup>

The questions reached new levels of obscurity and complexity when Thurmond asked, 'What constitutional difficulties did John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of Article IV, Section 2, through the necessary and proper

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<sup>71</sup> *Ibid.*, p.161.

<sup>72</sup> *Ibid.*, p.162.

<sup>73</sup> Letter from Roy Lucas to Strom Thurmond, 30<sup>th</sup> September 1967; letter from Strom Thurmond to Roy Lucas, 5<sup>th</sup> October, 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 3.



clause of Article I, Section 8?’<sup>74</sup> Following Marshall’s confession that he did not understand the question, Thurmond simply repeated the question word-for-word. At this point, Senator Edward M. Kennedy of Massachusetts interjected in order to bring clarity to Thurmond’s line of inquiry:

**Senator Kennedy:** Could we just have some further clarification so all of us can benefit? I really don’t understand the question myself. I was just wondering if the Senator, so we could all benefit from both the question and response, if we could have some further clarification of the question, because I really am confused as to what actually you are driving at, and I would like to hear the answer of the person that is called upon to answer.

**Senator Thurmond:** Well, I repeated the question twice. Would you like me to repeat it again?

**Senator Kennedy:** I thought rather than repeating the question maybe there was some other way that you could arrive at it.

**Senator Thurmond:** I don’t think I can make it any plainer, if you know the answer.

**Senator Kennedy:** I see.

**Senator Thurmond:** It is just a question of whether you know the answer.

**Senator Kennedy:** I see. Could you tell us how the Solicitor is –

**Senator Thurmond:** Well, I could tell you that Article IV, Section 2, did not set forth the powers vested in the United States. That’s the answer.

**Senator Kennedy:** That’s the answer. I see.<sup>75</sup>

Senator Kennedy’s remark provoked an outbreak of laughter, prompting Chairman Eastland to call the room to order, but Thurmond was not deterred in his humourless crusade.<sup>76</sup> When Marshall managed to provide an answer to Thurmond’s question on the 1866 abolition of the Slave Codes, Thurmond asked ‘is there anything else you wish to add?’<sup>77</sup> From this point, the question-and-answer session fell into a pattern of Thurmond asking a question which Marshall was unable to answer, whereby he would simply move on, occasionally pausing to ask Marshall if he understood a particular question. Each time Marshall was able to provide an answer, Thurmond asked him if he wished to add anything further, as if to imply that the answer had been unsatisfactory:

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<sup>74</sup> Hearings, 19<sup>th</sup> July 1967, p.163.

<sup>75</sup> *Ibid.*, p.163.

<sup>76</sup> *Ibid.*, p.163.

<sup>77</sup> *Ibid.*, p.163-4.

**Senator Thurmond:** What provision of the Slave Codes in existence in the South before 1860 was Congress desirous of abolishing by the civil rights bill of 1866?

**Judge Marshall:** Well, as I remember, the so-called Black Codes ranged from a newly-freed Negro not being able to own property or vote to a statute in my home state of Maryland which prevented these Negroes from flying kites.

**Senator Thurmond:** Is there anything else you wish to add?

**Judge Marshall:** No, sir.

**Senator Thurmond:** Now, on the 14<sup>th</sup> Amendment, what committee reported out the 14<sup>th</sup> Amendment and who were its members?

**Judge Marshall:** I don't know, sir.

**Senator Thurmond:** Why do you think the framers of the original version of the first section of the 14<sup>th</sup> Amendment added the necessary and proper clause from Article I, Section 8, to the privileges and immunities clause of Article IV, Section 2?

**Judge Marshall:** I don't know, sir.

**Senator Thurmond:** What purpose did the framers have, in your estimation, in referring to the incident involving former Representative Samuel Hoar in Charleston, South Carolina, in December 1844, as showing the need for the enactment of the original version of the 14<sup>th</sup> Amendment's first section?

**Judge Marshall:** I don't know, sir.

**Senator Thurmond:** Why do you think the framer said that if the privileges and immunities clause of the 14<sup>th</sup> Amendment had been in the original Constitution, the war of 1860-65 could not have occurred?

**Judge Marshall:** I don't have the slightest idea.

**Senator Thurmond:** Why do you think the equal protection clause of the original draft of the first section of the 14<sup>th</sup> Amendment required equal protection in the rights of life, liberty and property only?

**Judge Marshall:** I don't know.

**Senator Thurmond:** Did you understand that question?

**Judge Marshall:** Yes, sir.<sup>78</sup>

Thanks in part to Senator Kennedy's intervention, Marshall's ploy of remaining calm and admitting that he did not understand most if not all of Thurmond's well-prepared but occasionally inexplicable questions simply exposed the emptiness of the Senator's plan to prove the nominee unqualified. Even if Marshall had, for example, been able to name the committee which reported out

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<sup>78</sup> *Ibid.*, p.163-4.

the Fourteenth Amendment, in addition to the names of all of the committee members, his detailed answer might have embarrassed Thurmond and amused others in the room, but it would have demonstrated only an impressive academic knowledge, rather than legal ability or judgement. When Marshall did provide a detailed answer to Thurmond's question on the equal protection and due process clauses of the Fourteenth Amendment – issues relevant to several cases he had been involved in throughout his career – the Senator still insisted on making his inquiry into whether or not Marshall had anything else to 'add'.<sup>79</sup>

Eventually, Thurmond's style of attack backfired when he turned to the subject of constitutional interpretation, asking Marshall, 'Do you think that the Supreme Court must adhere to the original understanding of the Constitution as set forth by its framers, or may it ignore the intent of the framers and hold that a provision of the Constitution means whatever the Court chooses to have it mean at the moment?'<sup>80</sup> The question failed to back Marshall into a corner, and instead gave him an opportunity to challenge the premise of the question while at the same time asserting his true belief that the Constitution is a 'living' document which can be interpreted differently over time:

**Judge Marshall:** I don't agree with the end of your statement that the Supreme Court has a right to interpret the Constitution any way they see fit at that moment.

**Senator Thurmond:** So you do agree that they are bound to adhere to the original understanding of the Constitution as set forth by its framer?

**Judge Marshall:** As set forth by its framers, and I am not trying to get around the question. My point is that I take the position, which I think is contrary to what you intend in your question, that this is a living Constitution, and its – you can't expect the Court to apply the Constitution to facts in 1967 that weren't in existence when the Constitution was drafted. That I think is how it differs.<sup>81</sup>

At the conclusion of Thurmond's interrogation, Senator Hart made a brief statement, announcing that 'I think all of us were impressed by the research that

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<sup>79</sup> *Ibid.*, p.165.

<sup>80</sup> *Ibid.*, p.172.

<sup>81</sup> *Ibid.*, p.172-3.

Senator Thurmond has done. The questions he raised were interesting. I will have to get his answers before I know what the answers are to most of them. I did learn that there was a Michigan Senator I never heard of before who said something a hundred years ago which time has proved probably would have been wrong.’<sup>82</sup> Hart’s dry humour may have lightened the mood in the room temporarily before Chairman Eastland called Michael D. Jaffe, general counsel for the conservative Liberty Lobby organisation, to make a statement in opposition to Marshall’s confirmation. In making the case that Marshall was unqualified to sit on the Supreme Court, Jaffe reminded others in the room of the remarks made by Dr Alfred Kelly, which, as explained in Chapter Three, had become controversial during Marshall’s 1962 Second Circuit hearings. He also pointed out that, following those hearings, the late Senator Olin Johnston had declared in the Senate that ‘in studying the background of Thurgood Marshall, we discovered that, although he had practiced law in the state of New York, he had never been licenced to conduct this practice in that state ... The practice of law without a licence by Thurgood Marshall certainly denotes a careless attitude towards the law of the land.’<sup>83</sup>

With Strom Thurmond committed to proving Marshall’s ignorance and Olin Johnston appearing to contest Marshall’s qualifications from the grave, Fritz Hollings felt tremendous pressure to vote against Marshall’s confirmation in the Senate. He continued to mention his correspondence with the nominee in his letters to supporters, telling one concerned Anderson, South Carolina resident of ‘letters I have written the Solicitor General asking for his position on recent Supreme Court decisions’, adding that he had stated publicly that ‘if the Solicitor General could not find it within himself to disagree with these recent [Supreme Court] decisions [then] I did not feel I could vote for his confirmation.’<sup>84</sup>

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<sup>82</sup> *Ibid.*, 19<sup>th</sup> July 1967, p.179.

<sup>83</sup> *Ibid.*, 19<sup>th</sup> July 1967, p.179-83.

<sup>84</sup> Letter from Ernest F. Hollings to Walter T. Cardwell, 21<sup>st</sup> July 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

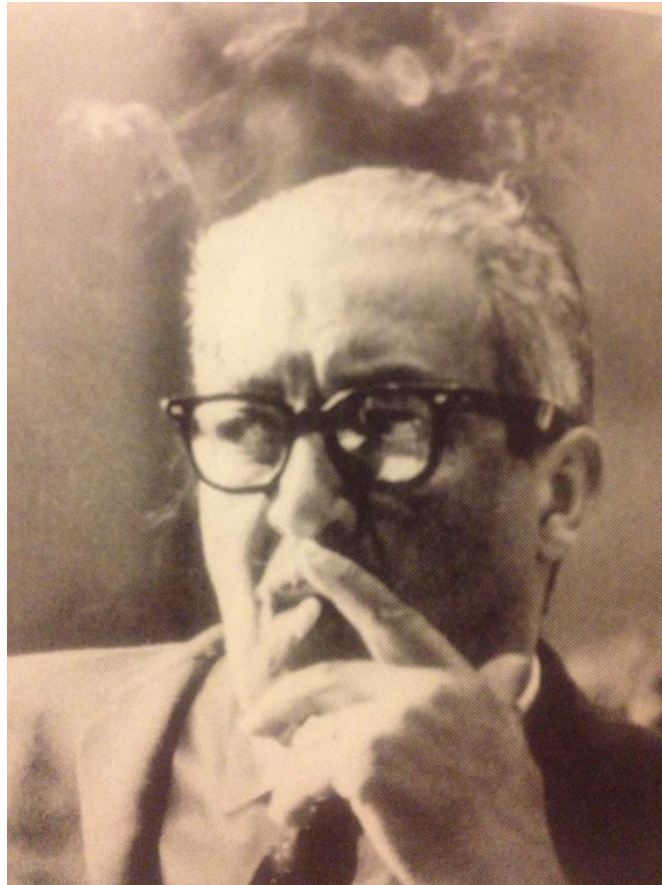


Figure 1. Thurgood Marshall at his confirmation hearings, 24<sup>th</sup> July 1967.

Senator McClellan presided over the final day of confirmation hearings, in the absence of James Eastland, on 24<sup>th</sup> July 1967. The development of Supreme Court nomination hearings into major political events of huge public interest was evident at the beginning of the hearing, when McClellan asked Marshall if he was bothered by the presence of photographers. A black and white photograph from this hearing, published in *The Washington Post* – showing a nonchalant Marshall gazing across the room through a cloud of cigarette smoke, his eyes giving away no indication of his thoughts on those facing him – is reminiscent of photographs of jazz musicians from the 1950s and 1960s, notably Julian ‘Cannonball’ Adderley.<sup>85</sup> Having spent more than two decades facing down Dixie before the nation’s press, Marshall declared that he had no objections to the photographers,

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<sup>85</sup> Photograph of Thurgood Marshall, 24<sup>th</sup> July 1967, *The Washington Post*, credited to McNamee, in Williams, *Thurgood Marshall*.

whereby the acting Chairman proceeded to question him at length on the use of wire-tapping.<sup>86</sup> Thurmond, having used up his arsenal of complex questions on obscure footnotes in the history of the Thirteenth and Fourteenth Amendments, grilled Marshall on the manner in which Supreme Court Justices might be impeached, finding that the Solicitor General was not shy in expressing his views on this subject:

**Judge Marshall:** I don't believe Congress has the right to impeach any judge if in the opinion of some Congressmen they wrongly interpret the Constitution.

**Senator Thurmond:** I am not speaking of some Congressmen. You know that impeachment would have to originate with the House, they would have to bring the impeachment proceedings. The Senate would sit as a jury and act upon the proceedings. So you would have the House originating the proceedings and the Senate acting by a two-thirds majority to convict on the impeachment. But I just wondered what your thinking was, if a Supreme Court member does not follow the Constitution, if you felt he ought to be impeached.

**Judge Marshall:** I have no position on that because I can't conceive of a situation you are talking about. If you mean that a Supreme Court justice, or indeed the Supreme Court itself, interprets the Constitution differently from the way Congress wants it interpreted, that Congress has a right to impeach, I don't believe that.

**Senator Thurmond:** I was afraid you would take that position. I have no more questions.<sup>87</sup>

With his unique onslaught of questions finally at an end, Strom Thurmond had succeeded spectacularly in leaving his mark on the history of the US Supreme Court nomination process. But the reactions of Senators Hart and Kennedy during the hearings suggested little likelihood that other Senators from outside the South would be swayed into opposing Marshall's confirmation. Even among the Southern delegation, some Senators were looking to the future, among them Fritz Hollings, who remained painfully aware that the Southern brand of obstructionism aimed at Thurgood Marshall by both Johnston and Thurmond during two separate sets of controversial Senate Judiciary Committee hearings

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<sup>86</sup> Hearings, 24<sup>th</sup> July 1967, p.187.

<sup>87</sup> *Ibid.*, p.197.

was looking increasingly out-of-date. By the summer of 1967, black Americans were voting in greater numbers; many were taking to the streets and speaking of 'black power', and the US Supreme Court would soon be welcoming its first African American Justice.

### **Flunking the Hollings Test**

On the very same day that his Senate Judiciary Committee hearings concluded, Marshall sent to Hollings three news clippings to illustrate the manner in which he had distanced himself from the philosophies of several key figures in the civil rights movement. The clippings consisted of articles from the Newark, New Jersey *Star-Ledger*, *The Chattanooga Times* and the Youngstown, Ohio *Vindicator*, all reporting an interview in which Marshall had repudiated Martin Luther King's advice to black Americans that they refuse to fight in Vietnam. He had also dismissed 'black power' by declaring, 'I could do without Stokely Carmichael', and disputed the meaning of the term by claiming that 'from the time the NAACP was organised, it was urging Negroes to vote, and if that's not black power, I don't know what is. But throwing Molotov cocktails is not black power. That's black anarchism.'<sup>88</sup> Hollings acknowledged receipt of the clippings with a polite response, but the information proved too little, too late for South Carolina's junior Senator.<sup>89</sup> In responding to concerned constituents who expected him to confirm the appointment, Hollings once again commented on his correspondence with Marshall, declaring, 'I wanted to know Mr Marshall's position on four fundamental points and wrote him, but he refused to answer ... Of course, this

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<sup>88</sup> 'King, Carmichael Pleas Annoy Marshall', *Newark, NJ Star-Ledger*, 16<sup>th</sup> April 1967; 'Marshall Raps "Black Anarchy"', *The Chattanooga Times*, 16<sup>th</sup> April 1967; 'Negro Leader Unhappy With King, SNCC', *Youngstown, Ohio Vindicator*, 16<sup>th</sup> April 1967; Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105.

<sup>89</sup> Letter from Ernest 'Fritz' Hollings to Thurgood Marshall, 26<sup>th</sup> July 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

refusal puts a Senator at a loss to judge the qualifications. I therefore decided to vote not to confirm.’<sup>90</sup>

The correspondence relating to the Marshall Supreme Court appointment which arrived at Hollings’s office during his first summer as a US Senator exposes the political divide in South Carolina during this particular period. In writing to express their support for the Marshall appointment, several Hollings supporters made clear their preference for Hollings’s brand of racial progressivism over the persistent racist posturing of Strom Thurmond. One Marshall enthusiast from Columbia claimed that ‘with you in Washington, South Carolina has the best opportunity it has ever had to be the most outstanding state in America ... but if you follow the same selfish ideas of our other Senators, you will find that South Carolina will remain on the bottom.’<sup>91</sup> Hollings received a particularly poignant letter from a Mr Samuel B. Hudson, a Georgetown resident writing ‘in quest of an answer to a twelve-year old Negro boy’s question, “Do we ever win?”’ In making the case that ‘this boy knows the accomplishments of Judge Marshall’ and ‘how hard he has struggled to prepare himself and ... become the best constitutional lawyer of his time’, the writer implored Hollings to ‘send an open letter to all Negro boys of South Carolina’, even if only to prevent these boys from joining black nationalist groups as a reaction to the racism of white politicians. He claimed that ‘this boy understands Senator Thurmond’s position for there is a long list of racist-type statements from him’, and added that the boy ‘is worried because your vote of “NO” would make the Senatorial delegation of South Carolina 100% against the progress of the Negro, and the Negro of South Carolina in particular.’<sup>92</sup>

Having been informed in an office memo that Mr Hudson was in fact the Assistant Director of the Office of Economic Opportunity (OEO) – set up as part of

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<sup>90</sup> Letter from Ernest ‘Fritz’ Hollings to I.P. Stanback, 16<sup>th</sup> August 1967; letter from Ernest ‘Fritz’ Hollings to Virginia Payne, 23<sup>rd</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>91</sup> Letter from I.P. Stanback to Ernest ‘Fritz’ Hollings, 14<sup>th</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>92</sup> Letter from Samuel B. Hudson, 6<sup>th</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.



President Johnson's War on Poverty – and also 'a responsible Negro with some political influence', Hollings composed a lengthy response, arguing that 'the main point I would make to you and your twelve-year old friend is that you do not lessen your faith or enthusiasm for the belief that regardless of colour in America, you can reach the top', adding that 'our twelve-year old friend should realise that it is Mr Marshall's cause rather than his race that I disapprove.'<sup>93</sup> The significance of Hudson's seniority in the OEO would not have been lost on Hollings: in 1967, Hollings was involved in intense negotiations with OEO Director R. Sargent Shriver, to obtain a \$17,000 contribution for a food stamp office being set up by black leaders in Williamsburg County, South Carolina.<sup>94</sup> Meanwhile, in response to a Mr James W. McPherson – described in an office memo as 'the biggest vote-getter' in the predominantly black city of Orangeburg – Hollings claimed that 'it boils down to a question: Will the appointee judge the law or attempt to make new law? But I wanted to give him every opportunity to dispel this concern. He refused.'<sup>95</sup>

These and Hollings's other responses showcase his careful political judgement on the Marshall question. In using Marshall's refusal to give a satisfactory answer to his questions as a reason to vote against confirmation, Hollings claimed that he admired Marshall for 'the fact that he took his grievances to the courts rather than to the streets' while also making clear that Marshall's race played no part in his decision.<sup>96</sup> Significantly, he argued that Marshall's 'legal ability, of course, is eminently more distinguished than that of Chief Justice Warren prior to his appointment, and I do not hesitate to state that I would vote for Mr Marshall before I would vote for Chief Justice Warren', which reads as a reminder to South Carolinians that their real enemy was in fact the man who had

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<sup>93</sup> Office memo from 'Betty' to Ernest 'Fritz' Hollings, 10<sup>th</sup> August 1967; letter from Ernest 'Fritz' Hollings to Samuel B. Hudson, 11<sup>th</sup> August 1967; letter from Ernest 'Fritz' Hollings to Virginia Payne, 23<sup>rd</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>94</sup> Hollings and Victor, *Making Government Work*, p.132.

<sup>95</sup> Office memo, undated, August 1967; letter from Ernest 'Fritz' Hollings to James W McPherson, 14<sup>th</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>96</sup> Letter from Ernest 'Fritz' Hollings to Samuel B. Hudson, 11<sup>th</sup> August 1967; letter from Ernest 'Fritz' Hollings to Virginia Payne, 23<sup>rd</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood; 'Hollings To Vote Against Marshall', *The Washington Post, Times Herald*, 5<sup>th</sup> August 1967, p.A6.

presided over the Court's unanimous decision in *Brown*, rather than the man who made the winning argument.<sup>97</sup> In making such statements, Hollings aimed to convince South Carolinians that he remained committed to the state's war on the Supreme Court but also that he remained unopposed to the cause of black advancement in the era of civil rights – a balancing act quite evident in the early draft of his comments from 20<sup>th</sup> June.<sup>98</sup> Perhaps more significantly, some of Hollings's letters included the claim, 'I did not ask silly questions', even when the Judiciary Committee hearings were not mentioned by the writer he was responding to.<sup>99</sup> As if Hollings's recognition of Marshall's qualifications and achievements was not enough, the inclusion of his 'silly questions' comment was clearly an attempt to distance himself from another distinguished Senator from South Carolina.

Thurmond, meanwhile, was receiving a mixed reaction to his extraordinary interrogation of Marshall during the hearings. Having read Thurmond's questions in a newspaper, a 'Mrs Arthur B. Ward', from Darien, Connecticut, wrote to the Senator to ask, 'can you honestly say you could answer those questions, and that you would have asked those questions of a white, conservative Southerner? I don't believe it – like the South's "fair" voter registration forms!'<sup>100</sup> Thurmond's response suggested a certain degree of tetchiness:

Dear Mrs. Ward:

Your card of recent date has been received.

Yes, I can answer the questions I posed to Mr. Marshall since I did extensive research for these hearings. Although I would not expect the average person, the average lawyer, or the average judge to be capable of

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<sup>97</sup> Letter from I.P. Stanback to Ernest 'Fritz' Hollings, 14<sup>th</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>98</sup> Draft of speech dated 20<sup>th</sup> June 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>99</sup> Letter from Ernest 'Fritz' Hollings to Virginia Payne, 23<sup>rd</sup> August 1967, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 105, Judiciary, Judges, Selection and Appointment, Supreme Court, Marshall, Thurgood.

<sup>100</sup> Letter from Mrs Arthur B. Ward to Strom Thurmond, 22<sup>nd</sup> July 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 2.

answering these questions, I would expect intelligent answers from a lawyer who has devoted his entire practice to the area of constitutional law concerning the 13<sup>th</sup> and 14<sup>th</sup> Amendments.

I feel that Mr. Marshall has displayed a great lack of comprehension of his own area of expertise. I intend to vote against confirmation of his nomination.

With best wishes,

Sincerely,  
Strom Thurmond<sup>101</sup>

In reporting on the hearings, Fred P. Graham noted in *The New York Times* that 'the hearings cast some doubt over Mr Marshall's mastery of constitutional history, but none at all on his dignity as a man ... They also proved to many observers the need for new ground rules to avoid questioning that does no more than punish a future Supreme Court justice.'<sup>102</sup> When a constituent sent this article to Thurmond, the Senator responded that he did not consider Graham's views 'to be a fair evaluation of the hearings. The questions I asked were ones which were on some rather obscure constitutional principles. However, Mr Marshall is noted as one of the foremost attorneys in the area of the Fourteenth Amendment, and I expected him to be knowledgeable enough to provide answers to my questions.'<sup>103</sup> While Mrs Ward and others may have been unconvinced by Thurmond's laughable claim that Marshall 'lacked comprehension in his own area of expertise', one resident of Spartanburg wrote to congratulate the Senator on his questioning, expressing the view that, 'I am quite sure the press expected you to question Marshall on the race issue, and planned to conjure up their usual biased reporting of the confrontation. Your line of questioning reflected not only a knowledge of constitutional law, but was a credit to yourself and to the stature of

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<sup>101</sup> Letter from Strom Thurmond to Mrs Arthur B. Ward, 27<sup>th</sup> July 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 3.

<sup>102</sup> 'Marshall on the Stand', *The New York Times*, 30<sup>th</sup> July 1967, p.142, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges). Year 1967, Box 26, Folder 2.

<sup>103</sup> Letter from Strom Thurmond to Mrs R. Kenneth Fairman, 14<sup>th</sup> August 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 3.

the entire South.<sup>104</sup> As Thurmond had known all along, he clearly represented a very different brand of voter from the more moderate South Carolinians who had supported Olin Johnston, and, more recently, Fritz Hollings.

### **Marshall Sorta Gets Sworn In**

Senator Eastland announced that the Judiciary Committee had approved the Marshall nomination by a vote of 11-5, with Senators Eastland, McClellan, Ervin and Thurmond voting against confirmation, along with Senator George Smathers of Florida.<sup>105</sup> When the nomination finally reached the Senate floor on 30<sup>th</sup> August 1967, Marshall was confirmed by the US Senate on a vote of 69-11.<sup>106</sup> Thurmond, Ervin and Eastland were joined in their opposition by eight Southern Democrats: Allen Ellender and Russell Long of Louisiana, Lister Hill and John Sparkman of Alabama, Herman Talmadge of Georgia, Robert C. Byrd of West Virginia, Spessard Holland of Florida, and, of course, Fritz Hollings of South Carolina.<sup>107</sup> The claim of Juan Williams that President Johnson managed to persuade twenty Senators not to vote may explain why several Southerners abstained, including Richard Russell of Georgia, James Eastland and John Stennis of Mississippi, and John McClellan of Arkansas.<sup>108</sup> For Hollings's supporters, many of whom were disappointed that he chose to side with the South Carolina political establishment, some salt may have been rubbed into the wound by the fact that a significant number of Southern Senators chose, in a sign of their acknowledgement of the changing Southern electorate following passage of the Voting Rights Act, to support Marshall's confirmation. In addition to the support of Republicans John Tower of Texas and Howard Baker of Tennessee, Marshall won the support of Southern Democrats

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<sup>104</sup> Letter from Alan R. Willis to Strom Thurmond, 21<sup>st</sup> July 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 2.

<sup>105</sup> 'Marshall Backed By Senate Panel', *The New York Times*, 4 August 1967, p.60.

<sup>106</sup> Perry, A 'Representative' Supreme Court?, p.102.

<sup>107</sup> 'Roll-Call Vote in Senate on Marshall Nomination', *The New York Times*, August 31, 1967, p.19.

<sup>108</sup> Williams, *Thurgood Marshall*, p.337-8.

William J. Fulbright of Arkansas, Albert Gore of Tennessee, Ralph Yarborough of Texas and William B. Spong of Virginia.<sup>109</sup>

Marshall was sworn in privately as an Associate Justice of the Supreme Court on 1<sup>st</sup> September 1967, with the oath administered by Alabamian Justice Hugo Black, a former member of the Ku Klux Klan.<sup>110</sup> A resident of Massachusetts wrote to Strom Thurmond a few days later over his concern that Marshall had told a reporter that he 'sorta got sworn in.'<sup>111</sup> The writer asked 'What did he mean? Did he or did he not take the oath to support the Constitution? Was he sworn in or was he not?' Thurmond responded that he had been informed by 'reliable sources' that all aspects of the procedure involved in Marshall's swearing-in had been completely legal, adding, 'as to what he meant by his statement, I am afraid you would have to ask him that.'<sup>112</sup>

In his 2008 memoir, Fritz Hollings described his vote against Marshall's confirmation as 'the most difficult decision in my political career.' Although his explanation that 'the South looked upon Johnson's appointment of Marshall as nothing more than a political down payment for the black vote' sounded eerily similar to the arguments being made by Southern politicians forty years earlier, he did concede that 'I knew if I voted to confirm him, my political career would be over.' In mentioning that Marshall's son, Thurgood Jr, later worked on the staff of the Commerce Committee on which he served, Hollings concluded, 'I am sure that he and his father understood my vote. As I look back at my years in the Senate, that is the one vote I regret.'<sup>113</sup> He did not mention the correspondence which took place between them, nor did he reflect on the fact that his dissenting vote aligned him unwittingly with Strom Thurmond's aggressive and opportunistic style of questioning. Despite being convinced that the Marshall controversy could have resulted in fatal consequences for his career, Hollings has never discussed the

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<sup>109</sup> Henry J. Abraham, *Justices, Presidents and Senators* (Rowman and Littlefield, 1999), p.221.

<sup>110</sup> Williams, *Thurgood Marshall*, p.338.

<sup>111</sup> Letter from Richard Parker to Strom Thurmond, 5<sup>th</sup> September 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 3.

<sup>112</sup> Letter from Strom Thurmond to Richard Parker, 13<sup>th</sup> September 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 3.

<sup>113</sup> Hollings and Victor, *Making Government Work*, p.128.

issue of where the pressure was coming from to oppose Marshall's confirmation. As with the letters being sent to Olin Johnston during his sustained opposition to Marshall's Second Circuit appointment, the content of Hollings's correspondence during the summer of 1967 suggests once again that South Carolina's racially moderate voices were ultimately shouted down by the state's dominant political establishment, with the anti-Court sentiments of lowcountry politicians only increasing following the Court's order to reconstruct malapportioned legislatures in the *Baker v. Carr* decision.

Furthermore, Hollings has said little regarding the reaction of the state's black community to his vote against Marshall. As *The New York Times* reported in September 1967, Hollings was criticised at a meeting of black leadership figures in Columbia, with Vernon Jordan, of the Voter Education Project (VEP), declaring, 'Fritz Hollings must understand one thing: The Negro vote giveth, and it taketh away.' Wiley A. Branton, Special Assistant to Attorney General Ramsey Clark and Director of the VEP, 'drew shouts of "No" from the audience when he asked, "Did Senator Hollings vote for you when he voted against Thurgood Marshall?"'<sup>114</sup> Far from suggesting that black South Carolinians had short memories, Hollings's re-election victory in November 1968 served as yet another indication of the frequent sacrifices made by black Southern voters when siding with the more moderate of the two candidates on offer in each round of elections.

As Governor of South Carolina, Hollings had led the way in guiding the South through a complex and delicate process of desegregation, but his vote against Thurgood Marshall's Supreme Court nomination – in which he was joined by ten other Southern Democrats, all of whom were elected prior to the start of the 1960s – implied that nothing had changed in the outlook of South Carolina's Senators since Olin Johnston cast his dissenting vote against the confirmation of Earl Warren as Chief Justice in March 1954.<sup>115</sup> By the end of the summer of 1967, there was ample evidence to suggest that Senators Thurmond and Hollings represented very different South Carolinian voters, yet, throughout the course of

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<sup>114</sup> 'South Carolina Negroes Meet To Push For Voter Registration', *The New York Times*, 25 September 1967, p.30.

<sup>115</sup> Abraham, *Justices, Presidents*, p.194.

deliberations over the Marshall Supreme Court nomination, neither Senator was able to make a positive gesture to re-assure the state's sizeable black community. While each demonstrated very different attitudes toward the nominee as a human being, both men ultimately voted for the same outcome. Despite the enormous changes occurring in South Carolina, and the political skill shown by Hollings in shepherding the state through an acceptance of *Brown* and the enrolment of black students in traditionally white Southern universities, the South Carolinian trait of resistance to federal interference in the Southern way of life was still perfectly intact in the troubled development of Supreme Court confirmation hearings into significant political events of growing public interest. Thurmond's passion for his new opportunity to interrogate Supreme Court nominees face-to-face as a member of the Judiciary Committee recalls W.J. Cash's description of the Southern man's 'love of self-assertion and battle – a chance to posture and charge and be the dashing fellow', and his style of attack would reach truly obnoxious proportions in the events covered in the next chapter, where his role on the Committee proved crucial in the failure of Lyndon Johnson's attempt to elevate Justice Abe Fortas to the position of Chief Justice following Earl Warren's retirement.<sup>116</sup>

Other than allowing further national exposure for South Carolina's war on the Supreme Court, the struggle over the confirmation of the nation's first African American Justice appeared to signal another defeat for the state's Senators. On the other hand, Thurmond had offered a graphic demonstration of a unique brand of dogged determination which would ultimately prevail in the case of Abe Fortas. The Fortas episode would confirm that the South Carolinian war on the Supreme Court could be effective in scoring significant victories but only when working in tandem with other potent political forces. Chapter Five will also analyse Thurmond's role in Richard Nixon's election victory in 1968, which would finally allow Southern conservatives the tantalising opportunity to encourage the appointment of judges who rejected Thurgood Marshall's notion of a 'living'

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<sup>116</sup> W.J. Cash, *The Mind of the South* (New York, NY: Alfred A. Knopf, 1949), p.86.

Constitution and employed the 'strict constructionist' approach of interpreting the document exactly as it was written. In the meantime, with Thurmond escalating his attack and Hollings continuing to carve out a unique conservative record on judicial nominations which would last for nearly four decades, the influence of South Carolina in the Supreme Court nomination process had reached unprecedented heights.



## **CHAPTER FIVE:**

### **Fortas ... The Word That Rang in Everyone's Ears**

*Now, Mr Chairman, for the reader of the record, he will be completely fogged up by that exchange. All that happened was that some people were pleased that the Justice did not agree that, whatever the crime rate is, it is a consequence of Supreme Court decisions. As I look over the room, everybody looks nice and clean and fine and fresh.<sup>1</sup>*

Philip A. Hart, 19<sup>th</sup> July 1968

With his concern for future historians once again evident, Senator Philip Hart of Michigan used this idiosyncratic choice of words to clarify the comments made by Senator Strom Thurmond of South Carolina regarding unwelcome 'demonstrations' during hearings to determine the suitability of Justice Abe Fortas for the position of Chief Justice of the United States. Having sat through Olin D. Johnston's interminable stalling tactics during Thurgood Marshall's Second Circuit hearings, and also Thurmond's barrage of carefully-worded and occasionally inexplicable questions during Marshall's Supreme Court hearings, Senator Hart observed the escalation of Thurmond's attack during the Fortas Chief Justice hearings, with his preambles, questions and diatribes merging occasionally into one barely coherent tirade. Unable to conceal his amusement at the reaction of some in the room to Fortas's blunt response to Thurmond's staggeringly lengthy and complex framing of one particularly straightforward question, Hart clarified

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<sup>1</sup> Hearings Before the Committee on the Judiciary, United States Senate, Ninetieth Congress, Second Session on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, printed for the use of the Committee on the Judiciary, US Government Printing Office, Washington: 1968, 19<sup>th</sup> July 1968, p.219-20.

for the record that the 'demonstration consisted of mild scattered applause for a statement that I would have applauded myself', preventing future historians from misreading the 'demonstration' as the work of anti-establishment youths, whose protests against the raging war in Vietnam would characterise the USA of the late 1960s.<sup>2</sup>

The failure of the 1968 Fortas nomination proved to be pivotal in the development of Supreme Court confirmation hearings into controversial, heavily-politicised events of increasing public interest. The existing literature has examined in depth the significance of the Fortas affair, with particular attention given to the failure of Lyndon Johnson's judgement during the final, troubled, year of his Presidency, and also the role of Thurmond as chief antagonist in the crusade to prove Fortas unsuitable for the highest judicial position in the nation. Yet there are other reasons why the full significance of Thurmond's leading role in the Fortas episode has not been fully realised in the current literature. Scholars such as Thurmond's recent biographer, Joseph Crespino, have discussed the importance of judicial politics in fashioning the conservative movement of the late twentieth century, but none of the existing studies have analysed Thurmond's behaviour in the context of South Carolina's long-standing war on the Supreme Court. From Olin Johnston's campaign to defy the Court's *Smith v. Allwright* decision in 1944 to the dilemma of Ernest 'Fritz' Hollings in opposing the nomination of the Court's first African American Justice, the full extent of South Carolina's war on the Court has remained an overlooked characteristic of post-war conservatism. For Mark Silverstein, the Fortas rejection marked the beginning of the 'modern' era of conflict in the Supreme Court nomination process, highlighting 'a new generation of Senate Republicans [who] understood that highly visible public battles to bring the Court back to the "silent majority" could produce real electoral dividends that would outweigh the consequences of any breach of timeworn patterns of Senate decorum and behaviour.'<sup>3</sup> One might add

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<sup>2</sup> *Ibid.*, p.219-20.

<sup>3</sup> Mark Silverstein, *Judicious Choices: The Politics of Supreme Court Appointments* (London: Norton, 1994), p.31-2.

that several Southern Democrats – pre-eminently those from South Carolina – had been pioneering this practice for years prior to the events of 1968.

Thurmond was able to engineer a Senate rejection of Fortas's nomination as part of a sustained attack on the liberal jurisprudence of the Supreme Court under the leadership of outgoing Chief Justice Earl Warren, but in this instance, his actions represented a tactical shift from an obstructive role to an interventionist role in the nomination process. As Thurmond himself was fond of telling his constituents, he had opposed the confirmation of every individual nominated to serve on the Supreme Court since the beginning of his service in the Senate in 1955. But his opposition to Fortas involved not only resistance to the nominee's confirmation, but also a concerted political effort to infiltrate the process of selection by using his growing influence as a member of the Senate Judiciary Committee. For Thurmond, the complex political situation within the Senate during the summer of 1968 allowed an opportunity to prevent the outgoing Lyndon Johnson from replacing Warren, with a view to getting the vacancy filled by the incoming President.

The Fortas affair also forms a crucial aspect of Strom Thurmond's political significance following his 1964 defection to the Republican Party. Rather than following his previous tactic of opposing the Court in collaboration with the Southern Democratic bloc led by Georgia's Richard Russell, this time Thurmond allied himself with Republican presidential hopeful Richard Nixon, and developed an effective partnership with Michigan's recently-elected Republican Senator, Robert P. Griffin. Ultimately, the role played by Thurmond in Abe Fortas's rejection was part of his growing influence in the Republican Party, which proved critical in the gradual Republican takeover of the South, culminating in a political dominance over the region which remains in place to this day.

For this reason and others, this chapter highlights the importance of research objective (3) in avoiding the study of Supreme Court nominations as 'one-off' events. The Fortas affair does provide evidence of at least one occasion on which Thurmond achieved genuine political influence in the nomination

process despite, or perhaps in part as a result of, his truly obnoxious and provocative behaviour in confronting the individuals chosen by Presidents to serve on that most powerful political institution. On the other hand, as previous chapters have shown, the persistent influence of South Carolina's Senators in the appointment of Supreme Court Justices transcends the issue of whether or not a nominee was rejected. As will become clear, the Fortas controversy represents one of several landmark events in the state's war on the Court, suggesting that analyses of nomination hearings as 'one-off' events fail to take account of the consistency in state, and regional, agendas, and also tend to obscure the long-term escalation of the tensions which defined and shaped the development of the nomination process throughout this era.

The chapter opens with a brief examination of the relationship between President Lyndon Johnson and the two Senators from South Carolina, and some consideration of how this relationship was permanently broken by Olin Johnston's death and Strom Thurmond's party defection. Fortas's confirmation hearings are covered in depth, before the chapter analyses the extent to which Thurmond's crusade put South Carolina at the centre of a key victory in the rise of the US conservative movement. Perhaps more importantly for the thesis, this chapter will highlight research objective (1) by showcasing South Carolina's vital contribution to the development of Supreme Court nomination hearings into highly political, and controversial, public events. An emphasis on research objective (2) will be evident in Thurmond's critical backing of Richard Nixon's presidential campaign, which highlights, once again, South Carolina's politics on a national scale through the state's extraordinary influence in judicial appointments. Finally, the chapter will reflect on the grim conclusion of the Johnson Presidency in order to highlight the shift in the South Carolina Senators' agenda, which is covered in further detail in the following chapter.

## **Squeezed in the Middle**

Following the announcement that Chief Justice Earl Warren had informed President Johnson of his intention to retire from the Supreme Court, Strom Thurmond spoke for many in the South when he claimed that Warren had done 'more harm to the American way of life than any other one man holding public office in the history of our country.'<sup>4</sup> In contrast to the deferential tone of his letter to Lyndon Johnson following the retirement of Justice Tom C. Clark the previous year, Thurmond told the press in plain terms that as Johnson had announced on television that he would not stand in the 1968 Presidential Election, he should now refrain from making any further nominations to the Supreme Court. While his letter from the previous year had offered 'friendly advice', Thurmond now declared that he was 'unalterably opposed to a lame duck president attempting to fill the vacancy on the Court to designate a new Chief Justice,' making clear his intention to 'strongly oppose any attempt by President Johnson to do so.'<sup>5</sup>

He would soon be joined in his outlook by Republican Senator Robert P. Griffin of Michigan, who declared that 'never before has there been such obvious political maneuvering to create a vacancy so that a "lame duck" president can fill it.'<sup>6</sup> The combined indignation of Thurmond and Griffin would no doubt have increased if either man had been able to prove that Johnson and Warren were in talks over who should become the new Chief. Keen to ensure that Johnson, rather than a potential Republican successor, name his replacement, Earl Warren proposed that the President bring back Arthur J. Goldberg, who had resigned from the Court two years earlier to become Ambassador to the United Nations.<sup>7</sup> Johnson opted instead to elevate Justice Abe Fortas, his long-time counsel and

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<sup>4</sup> Joseph Crespino, *Strom Thurmond's America* (New York: Hill and Wang, 2012), p.214.

<sup>5</sup> Letter from Strom Thurmond to President Lyndon Johnson, 2<sup>nd</sup> March 1967, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States Court and Supreme Court Judges), Year 1967, Box 26, Folder 2; 'Thurmond Urges Johnson Not To Fill Court Vacancy', *The News and Courier*, 22<sup>nd</sup> June 1968, p.6A.

<sup>6</sup> Timothy R. Johnson and Jason M. Roberts, 'Presidential Capital and the Supreme Court Nomination Process', *The Journal of Politics* 66/3 (2004), pp.663-683.

<sup>7</sup> David Stebenne, *Arthur J. Goldberg: New Deal Liberal* (Oxford: Oxford University Press, 1996), p.371.

presidential advisor, to the Chief Justiceship. To complicate matters further, the President also nominated Texan Homer Thornberry, another loyal Johnson man, as a replacement Associate Justice, to step in when Abe Fortas became Chief. Given the ambiguity over whether or not Warren had in fact submitted a formal resignation – as opposed to simply informing the President of an ‘intention’ to retire – an incredulous Thurmond resented the possibility that Johnson had engineered a situation whereby Southerners would be stuck with Warren if they refused to confirm Fortas.<sup>8</sup> By Thurmond’s logic, if Warren was still serving, then there was no vacancy for a new Chief Justice, and if Fortas was still serving, then no vacancy existed for an Associate Justice – a situation that enabled him to refuse to recognise the Thornberry nomination and make Fortas his target.

Thurmond’s hostility toward the Supreme Court was only exacerbated by the announcement in May of the *Green v. County School Board of New Kent County* decision, which ruled that an Eastern Virginia school board’s admissions policy did not comply with the legal requirements of a desegregated school system, providing further evidence for some Southerners of the Court’s on-going bias against the South, fourteen years on from *Brown v. Board of Education*.<sup>9</sup> In declaring to his supporters that he was ‘very much opposed to [Fortas’s] appointment and will do whatever is necessary, including taking part in a filibuster, to block this nomination’, Thurmond outlined clearly a determination, after fourteen bitter years of tolerating Earl Warren, to prevent the Supreme Court from falling into the hands of another dangerous liberal Chief Justice.<sup>10</sup>

By contrast, Fritz Hollings’s position on the Fortas nomination appeared ambiguous. In response to constituents urging him to join Thurmond’s opposition, Hollings claimed that ‘the proposed filibuster is for political shenanigans and does not involve the Fortas qualifications. Long before I came to Washington, the

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<sup>8</sup> Hearings Before the Committee on the Judiciary, United States Senate, Ninetieth Congress, Second Session on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, printed for the use of the Committee on the Judiciary, US Government Printing Office, Washington: 1968, p.12-3; p.22-3.

<sup>9</sup> Crespino, *Strom Thurmond’s America*, p.213.

<sup>10</sup> Letter from Strom Thurmond to Mayor Allan L. Luke, jr, 2<sup>nd</sup> May 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 20, Folder 1.

Senate confirmed Justice Fortas for the Supreme Court. His qualifications were considered then, but no-one suggested a filibuster. A filibuster is proposed now on the basis that the President, having only six months left in his term, is a “lame duck” and therefore has no right to appoint. He not only has the right but the duty.’<sup>11</sup> Having already hailed Johnson’s recent appointment of General William Westmoreland as US Army Chief of Staff, Hollings protested that he could not claim the very next week that the ‘lame duck’ Johnson had no right to make any more appointments. He maintained that ‘if the Republicans thought Fortas should be filibustered against because of his qualifications, they could have well done so on August 11, 1965, when he was confirmed for the Supreme Court. They didn’t then, and I won’t join in their shenanigans now.’<sup>12</sup>

Although he may have been successful in preventing South Carolinians from confusing him with Strom Thurmond, the state’s junior Senator faced further challenges in negotiating his position on the Fortas nomination, just as he had experienced one year earlier when arriving at the difficult decision to oppose the appointment of Thurgood Marshall. His declaration in *The News and Courier* that he would vote against Fortas and Thornberry prompted former state Senator Calhoun Thomas, of the Beaufort County Democratic Committee, to remind Hollings that ‘in Beaufort County, we are going to have to depend on a large Negro vote in your behalf, if you are going to make a real showing in this county. Right now, I am of the opinion that the Negroes are extremely lukewarm as to your race for re-election ... You may not be aware of it, but there is a lot of resentment toward you, because of such positions taken by you in respect to these nominations.’<sup>13</sup> In his brief response, Hollings outlined his belief that Democratic control of South Carolina could be maintained through adopting a

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<sup>11</sup> Letter from Ernest ‘Fritz’ Hollings to William W. Kelly, 12<sup>th</sup> July 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>12</sup> Letter from Ernest ‘Fritz’ Hollings to Walter Brown, 9<sup>th</sup> July 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>13</sup> Letter from Calhoun Thomas to Ernest ‘Fritz’ Hollings, 10<sup>th</sup> July 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

conservative position on the Supreme Court. As he explained to Thomas, 'I can't in conscience confirm the Warren philosophy. I made this crystal clear in the primary, and I believe my position on the Supreme Court would help build me as a stronger Democrat, and, in turn, build a stronger party in our state.' In referring to the continued defection to, or at least sympathy with, the Republican Party, Hollings added that 'our strongest Democratic candidate, Mendel Rivers, curses these things outright and supports the candidate of the other party. I am squeezed in the middle and do my best, and I do appreciate your concern.'<sup>14</sup>

While Hollings's dismissal of the 'lame-duck' argument constituted a deliberate move to distance himself from Thurmond, the similarity of their political outlook on other issues was quite evident in the letters and news releases sent out by each Senator during the summer of 1968. In response to letters from concerned South Carolinians, urging them to reject gun control legislation, both Senators released communications that combined the threat posed by the Supreme Court with a personal endorsement of the right to bear arms. In his letters, Thurmond would frequently follow up a statement of his willingness to filibuster the Fortas nomination with a declaration that 'I believe that the states have the prime responsibility to legislate controls on firearms.'<sup>15</sup> In response to a letter from Jack C. Hawe, Chief of Police in the city of Santa Barbara, California, who offered information on gun control while condemning 'the permissiveness and extreme liberal attitudes that prevail in our democracy', Thurmond claimed that the information would assist him in blocking Fortas's nomination on the Senate floor, adding, 'I want you to know that I am truly appreciative of the tremendous task facing law enforcement personnel at this particular time.'<sup>16</sup>

Hollings, true to his reputation for a folksier style of communication, opened his 20<sup>th</sup> June newsletter by declaring:

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<sup>14</sup> Letter from Ernest 'Fritz' Hollings to Calhoun Thomas, 15<sup>th</sup> July 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>15</sup> Letter from Strom Thurmond to C.A. Vines, 19<sup>th</sup> July 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 21, Folder 4.

<sup>16</sup> Letter from Jack C. Hawe to Strom Thurmond, 24<sup>th</sup> July 1968; letter from Strom Thurmond to Jack C. Hawe, 2<sup>nd</sup> August 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 21, Folder 4.



Last Christmas was the best ever. I gave my 17-year old son a 12-gauge Browning automatic, and we went hunting together. It's difficult to get on the same frequency with these teenagers. We did on these hunts, and I wouldn't want to pass any law that would mar this pleasure. Moreover, I can understand the home owner, the store owner, and the bus driver wanting a weapon. With militants and the church leadership recommending civil disobedience ... and with the Supreme Court decisions, the average man has lost confidence in the law.<sup>17</sup>

One reason for the increasing South Carolinian concern over law and order was the violence witnessed during the Orangeburg Massacre, which, on 8<sup>th</sup> February 1968, brought to a sudden end the relatively peaceful nature of South Carolina's civil rights movement when a tragic outburst of police gunfire killed three students and injured twenty-eight others during a protest at the segregated All-Star Bowling Lane.<sup>18</sup> Described by Governor Robert E. McNair as 'one of the saddest days in the history of South Carolina', the massacre proved to be, for civil rights activist Reverend I. DeQuincey Newman, 'an indication that despite all that might be considered progress in terms of interracial co-operation, beneath the surface South Carolina is just about in the same boat as Alabama and Mississippi.'<sup>19</sup> With the continued Southern resentment over the Court's *Miranda v. Arizona* decision, and the growing public hysteria over outbreaks of racial violence in the streets, it was inevitable that the law and order issue would become a significant aspect of the Fortas hearings, particularly as both Thurmond and Nixon were discussing the issue frequently throughout the latter's presidential campaign.<sup>20</sup> Following Thurmond's statement in an interview during the 1968 Republican convention in Miami that 'the number one issue in this

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<sup>17</sup> Newsletter from the office of Senator Ernest 'Fritz Hollings', 20<sup>th</sup> June 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>18</sup> Walter Edgar, *South Carolina: A History* (Columbia, SC: University of South Carolina Press, 1998), p.542.

<sup>19</sup> Jack Bass and W. Scott Poole, *The Palmetto State: The Making of Modern South Carolina* (Columbia: University of South Carolina Press, 2009), p.118-9.

<sup>20</sup> Laurence H. Tribe, *God Save This Honorable Court* (London: Random House, 1985), p.71.

campaign is law and order', NBC's David Brinkley remarked that the American voter was 'free to interpret the true meaning of that phrase however he likes.'<sup>21</sup>

### 'Oh, My ...'

Lyndon Johnson's reputation as a master of congressional politics was built largely on his understanding of the wants and needs of individual Senators, and the skilful use of such wants and needs as political carrots. With barely six weeks to adjust to the demands of the Presidency following John F. Kennedy's assassination, Johnson received a letter from Robert McNair, then South Carolina's Lieutenant Governor, pointing out the concern of the General Assembly and the South Carolina Bar Association over the on-going delay in filling two judicial vacancies for the state's Eastern District.<sup>22</sup> It was not until April 1964, when Johnson became impatient over the passage of a Civil Service payment bill – to be overseen by Olin Johnston in his capacity as Chairman of the Post Office and Civil Service Committee – that he began talking seriously about nominating the two South Carolinian judges. But the President had inadvertently waded into a muddle of competing interests that highlighted the complex political situation in South Carolina during the early 1960s.

The growing distance between Johnston and Thurmond was evident in Thurmond's on-going effort to promote Robert Figg, now serving as Dean of the University of South Carolina Law School, for one of the two outstanding Eastern District vacancies. While a consensus existed that one vacancy would go to Johnston's friend, Congressman Robert W. Hemphill, it was assumed within the Thurmond camp that Johnston's sour memories of the 1950 Senate contest would lead him to withdraw his tepid support for Figg and choose instead to endorse Congressman Charles E. Simons as a means of denying Figg the second vacancy.

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<sup>21</sup> Crespino, *Strom Thurmond's America*, p.220-1.

<sup>22</sup> Letter from Robert E. McNair to Lyndon Johnson, 30<sup>th</sup> January 1964, Robert E. McNair Collection, Lieutenant Governor Files, Box 2, Judicial Endorsements for Charles Simons and Robert Hemphill as US District Judges, 1962-1964.

By October 1963, Thurmond was growing impatient with the delay, telling state Senator John C. West that 'I will not give consideration to any nomination to fill the Timmerman seat until the Senate also has before it a nomination to fill the Williams seat, which has been vacant since early in 1962', adding his view that 'it is in the interest of all South Carolinians that the "advice" as well as the "consent" of the Senators be sought and heeded ... particularly in view of the sensitive and important issues now being decided by the federal courts.'<sup>23</sup> While Thurmond was happy to accept Simons, his former law partner, as his second preference, he had become embarrassed by Simons' support for Olin Johnston during the 1962 Senate primary. Given that Simons had supposedly switched his allegiance from Fritz Hollings to Johnston after finding out that the latter might object to Robert Figg's nomination and therefore support him for one of the two vacancies, Thurmond was advised by Walter Brown that 'if Olin turns down Bob and accepts Simons, then a lot of people in South Carolina will conclude there was a political deal on this judgeship.'<sup>24</sup>

But it was Olin Johnston who would reach an agreement with President Johnson over the two judgeships. Knowing how badly the South Carolina Democrats wanted to see Hemphill and Simons confirmed, the President telephoned Johnston to urge the swift passage of the pay bill, telling the Senator, 'alright now, Olin, I'll tell you, we've gotta do this in a hurry because I'm losing the best men I've got in the government.' After assuring him that 'I'll get your judges up there simultaneously and I'll call you and then I'll call Strom, and they'll be who you want', an irate Johnson pressed the Senator to use his influence on the Judiciary Committee to ensure a swift confirmation for the two judges:

**LBJ:** Alright, you get 'em to have permission to let you waive the hearing on these judges so you can get 'em confirmed quick.

**Johnston:** Good. I'll do everything –

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<sup>23</sup> Letter from Strom Thurmond to John C. West, 3<sup>rd</sup> October 1963, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1963, Box 25, Folder 3.

<sup>24</sup> Letter from Walter Brown to Strom Thurmond, 13<sup>th</sup> July 1962, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, (United States Court and Supreme Court Judges), Year 1962, Box 19, Folder 1.

**LBJ:** Now, if you don't, they tell me that the NAACP is liable to come in and protest.

**Johnston:** Well, we'll get 'em right through.

**LBJ:** They, they, they, they, they say your boy Simons is not qualified.

**Johnston:** Well, I think he is.

**LBJ:** Well, I know he is if you want him, and, and you don't want that Professor and that's why I'm naming [*Simons*].

**Johnston:** Yeah.

**LBJ:** So you just get, you get that, hell, I put you on that Committee, uh, uh, as leader to help old man McCarran and help us with some of our plans. So you just get John McClellan and Sam Ervin and some of your buddies and tell them that dammit, you want a sub-committee and you want it to meet and report 'em right quick.

**Johnston:** Well, we'll do everything we can.

**LBJ:** Alright.

**Johnston:** Good.

**LBJ:** I can count on you now to get that pay bill out in a week or so?

**Johnston:** I'll do it.

**LBJ:** Alright, goodbye.<sup>25</sup>

Later the same day, the President was irritated to find that the two nominations had been announced in the press before he could make them official. He again telephoned Johnston, whose 'surprised' response – 'Oh, my' – may or may not have convinced Johnson of the Senator's view that newspapermen were getting ahead of themselves:

**LBJ:** They quote you and Thurmond both saying they're quite imminent and all about what's gonna happen and now they're jumping on me and I'll get all, uh –

**Johnston:** Well, I think the news has gone a little far on it.

**LBJ:** Well let me read you what the, the press boys are asking us about, and we're telling them we don't know a damn thing about it: 'President Johnson today was reported on the verge of nominating Hemphill and Simons'. All that does is just notify anybody who wants to protest and raise hell –

**Johnston:** Well –

**LBJ:** – which they're doing.

**Johnston:** – you won't get anything coming from me, names, any particular people.

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<sup>25</sup> Telephone conversation between Lyndon B. Johnson and Olin D. Johnston, 14<sup>th</sup> April 1964, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6404.09) 3029 [http://millercenter.org/scripps/archive/presidentialrecordings/Johnson].

**LBJ:** 'Senator Olin Johnston issued a statement quoting the President as saying he would release his nominations if possible tomorrow' –

**Johnston:** Well –

**LBJ:** – 'for two long-vacant judgeships. Johnston said the President promised one nomination would go to Hemphill, a congressman since '57, and Senator Thurmond agreed the nominations were imminent, and said the other nominee would be Simons, 47, a lawyer in Aiken'.

**Johnston:** I haven't talked to Thurmond anything about it either.

**LBJ:** 'Simons is a former law partner of Thurmond'.

**Johnston:** Mm-hm.<sup>26</sup>

With his on-going concern over the best men in his government 'quitting like flies', Johnson again reminded Johnston to ensure passage of the civil service pay bill, before making a much calmer and more business-like call to Strom Thurmond, with whom he had never enjoyed a particularly cordial relationship:

**LBJ:** Strom.

**Thurmond:** Mr President, how are you?

**LBJ:** Fine. Bill Moyers already talked to you, I find out, I ju ... while I was calling you, he called you from the other office.

**Thurmond:** Uh, he just called me and said that you're gonna send the judgeships up tomorrow.

**LBJ:** We're gonna try to get both of them out tomorrow. I'd , I'd wait 'til, uh, uh, well, I guess y'all can go ahead and say so, we'll ... uh, we'll, uh, notify 'em and uh, uh ... I think ... uh, they're ... I think we'll try to get 'em out by the twelve o'clock meeting.

**Thurmond:** Fine.

**LBJ:** OK, Str –

**Thurmond:** Thank you very much, Mr President.

**LBJ:** Right, Strom. 'Bye.

**Thurmond:** 'Bye. Goodbye.<sup>27</sup>

Shortly after the call, Thurmond sent a telegram to Lieutenant Governor McNair to confirm the President's agreement to name the two nominees.<sup>28</sup>

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<sup>26</sup> Telephone conversation between Lyndon B. Johnson and Olin D. Johnston, 14<sup>th</sup> April 1964, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6404.09) 3031.

<sup>27</sup> Telephone conversation between Lyndon B. Johnson and Strom Thurmond, 14<sup>th</sup> April 1964, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6404.09) 3032.

<sup>28</sup> Telegram from Strom Thurmond to Robert McNair, 14<sup>th</sup> April 1964, Robert McNair Collection, Lieutenant Governor Papers, Box 2, Judicial Endorsements for Charles Simons and Robert Hemphill as US District Judges, 1962-1964.

Following Olin Johnston's death, Thurmond's defection to the Republicans and Barry Goldwater's victory in South Carolina in the 1964 Presidential Election, Lyndon Johnson's relationship with South Carolina's Senators would never again be quite so straightforward. Only four years after playing second fiddle in the nominations of Hemphill and Simons, Strom Thurmond's influence over the process of judicial nominations was transformed. As South Carolina's senior Senator, he now held a place on the Senate Judiciary Committee as a Republican Senator during the party's rapid expansion in the Southern states. Following Johnson's announcement in a television address on 31<sup>st</sup> March 1968 that he would neither seek nor accept the Democratic Party nomination for that year's Presidential Election, Republican hopes for taking back the White House were encouraged further by the escalation of the war in Vietnam, growing concerns over crime and disorder in the streets, and a developing white conservative resentment over civil rights legislation, particularly in the South. Tennessee Republican Bill Brock, who was elected to the Senate in 1970, remembers the 1960s as a critical period for the South, with the region's transition to the Republican Party becoming evident in the growing number of successful Republican candidates: 'The elections of John Tower in Texas, Howard Baker in Tennessee, and myself, along with a number of other Southern Senators and members in the 1960s, created an excitement with Republicans in general, and President Nixon, in particular. All felt that the South posed an enormous new opportunity for party growth.'<sup>29</sup>

The role of South Carolina in this transition was led by, but not exclusive to, the towering figure of Strom Thurmond, who used his influence to build on the hard work of white upcountry activists in revitalising the state's Republican Party during the 1950s and 1960s.<sup>30</sup> Many of the state's other politicians, including former Governor James F. Byrnes, had supported Republican Dwight D. Eisenhower's presidential campaigns in the 1950s, and Thurmond was followed into the Republican Party by Congressman Albert Watson and former

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<sup>29</sup> Letter from Bill Brock, 22<sup>nd</sup> April 2014.

<sup>30</sup> Robert Mickey, *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015), p.232-3.

Congressman Arthur Ravenel Jr in the early 1960s. Although Byrnes opted to remain a Democrat, he gave his private blessing to Thurmond when the latter discussed his plans to defect in 1964, and criticised the ‘punishment and humiliation’ inflicted on Albert Watson by senior Democrats, who stripped away Watson’s congressional seniority after he endorsed Barry Goldwater’s presidential campaign.<sup>31</sup> South Carolina’s Democratic establishment may have fought tooth and nail to maintain Democratic control over the state, but many in the party fought equally hard to maintain a South Carolinian tradition of independence – a trait which, ironically, led many to endorse Republican Party candidates before eventually defecting to that party themselves.

As a result of this transition, South Carolina became a crucial state in the expansion of the US conservative movement, with the Abe Fortas Chief Justice nomination providing an early example of the ‘culture wars’ which would fuel conservative mobilisation during the latter part of the twentieth century.<sup>32</sup> For Thurmond, who had gnashed his teeth in frustration when Fortas was confirmed as an Associate Justice three years earlier, the 1968 hearings would provide, for the first time ever, an opportunity for him to confront a serving Justice of the Supreme Court. Although Hollings would play no part in the hearings, the nomination once again placed him in a difficult position. With his acknowledgement of being ‘stuck in the middle’ as a conservative Democrat during the state’s dramatic shift toward the Republican Party, Hollings would continue to distance himself from his South Carolina colleague by taking advantage of the fact that, unlike Thurmond, he had not been in the Senate when Fortas was first confirmed for a seat on the Court. While Hollings’s portrayal of filibuster plans as Republican ‘shenanigans’ recalled the late Olin Johnston’s spirited resistance to the development of the state’s emerging two-party system, the role of Thurmond and South Carolina in the process of conservative mobilisation cannot be overstated. The importance of this episode in the history

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<sup>31</sup> David Robertson, *Sly and Able: A Political Biography of James F. Byrnes* (New York, NY: W. W. Norton and co, 1994), p.536-7; Billy B. Hathorn, ‘The Changing Politics of Race: Congressman Albert William Watson and the S.C. Republican Party, 1965-1970’, *The South Carolina Historical Magazine* 89:4 (October 1988), pp.227-241; p.230.

<sup>32</sup> Crespino, *Strom Thurmond’s America*, p.225.

of the state's troubled relationship with the Supreme Court was never more evident than in Thurmond's explosive behaviour during Fortas's infamous confirmation hearings.

### **The Hearings**

While an unimpressed Thurgood Marshall had faced down his Southern adversaries through a haze of cigarette smoke, and the combative Robert Bork would respond to his critics twenty years later with a fierce, devil-may-care attitude, Abe Fortas was a quiet man whose temperament was ill-suited to the ordeal of Supreme Court nomination hearings. His voice, barely audible in Lyndon Johnson's crackly telephone recordings, was often so quiet during the hearings that the ageing Senator John McClellan of Arkansas complained that he could not hear Fortas's responses to his questions. With his reserved, soft-spoken persona, the Tennessean was a perfect foil to the boisterous Lyndon Johnson, but his cerebral, academic approach was never likely to sit well with a Senate Judiciary Committee characterised by the cigar-chewing cynicism of Chairman James Eastland, the simmering bulldog demeanour of Sam Ervin, and especially the unfiltered theatrics of Strom Thurmond. Having been prepared for the hearings by the Department of Justice, Fortas knew to expect questions regarding his long friendship with Johnson, whom he had first met while serving as general counsel of President Franklin D. Roosevelt's Public Works Administration in the 1940s. After heading Johnson's successful legal strategy during the fight over the contested Senate election in Texas in 1948, Fortas had become one of Johnson's most trusted political advisors.<sup>33</sup> The relationship between the two men became a vital ingredient in Johnson's rise to power, with Bruce Allen Murphy noting that

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<sup>33</sup> Robert Dallek, *Lyndon B. Johnson: Portrait of a President* (London: Penguin, 2004), p.68-9; Barbara A. Perry, *A 'Representative' Supreme Court? The Impact of Race, Religion and Gender on Appointments* (London: Greenwood Press, 1991), p.77.



‘together, they had learned how to operate the wheels of government and together they got on the treadmill to the top.’<sup>34</sup>

Despite the obvious concerns over the relationship between the President and the man who was nominated to become Chief Justice of the United States, the members of the Judiciary Committee were initially more pre-occupied with the question of whether or not a vacancy did in fact exist on the Supreme Court. On the first day of hearings, 18<sup>th</sup> July 1968, Attorney General Ramsey Clark – who had been appointed by Johnson as part of an elaborate scheme to prompt the retirement of his father, Justice Tom Clark, so that Johnson could make Thurgood Marshall the first African American Supreme Court Justice – had the unenviable task of clarifying to members of the Senate Judiciary Committee the issue of whether or not Chief Justice Warren had in fact resigned, or whether his resignation would become effective only when Fortas was confirmed as his replacement.<sup>35</sup> Some of the Southern members on the Committee, who had loathed Warren quite openly since the announcement of *Brown* in 1954, were particularly keen to confirm that the current Chief Justice genuinely intended to leave the Supreme Court. Chairman Eastland inquired as to whether Warren’s resignation was ‘irrevocable’, while North Carolina’s Sam Ervin read from a newspaper report suggesting that Warren would remain as Chief Justice if Fortas was not confirmed.<sup>36</sup> Thurmond also expressed an interest in the issue, albeit in the form of his typically confrontational style of questioning:

**Senator Thurmond:** In a news conference held by Chief Justice Warren, he stated that he could serve on and would be willing, I believe, to do so. Did you see that statement by him?

**Attorney General Clark:** I have read his statement, yes. I have seen newspaper clippings on it.

**Senator Thurmond:** Therefore, does it not come down to this. Chief Justice Warren is virtually saying to the Senate, ‘You confirm Justice Fortas or I will

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<sup>34</sup> Bruce Allen Murphy, *Fortas* (New York, NY: William Morrow, 1988), p.50-1.

<sup>35</sup> Hearings Before the Committee on the Judiciary, United States Senate, Ninetieth Congress, Second Session on Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, printed for the use of the Committee on the Judiciary, US Government Printing Office, Washington: 1968, 11<sup>th</sup> July 1968, p.8.

<sup>36</sup> *Ibid.*, p.12; p.22-3.

continue to serve.’ And if that is the case, how can there be a resignation of Chief Justice Warren? How is there a resignation if he can continue to serve? Either there is a resignation, or there is not a resignation. I ask you which is it?

**Attorney General Clark:** Well, there is no resignation. The question is whether his retirement is effective. If so, when it will be.<sup>37</sup>

The very suggestion that a deal had been made by the Johnson Administration and the Chief Justice in order to encourage Fortas’s confirmation provoked sufficient suspicion on the part of the Southern Committee members for the hearings to become lengthy, controversial, and unpleasant for the nominee. The danger of this issue alienating Southern Senators would be exacerbated further by a press conference given by Earl Warren, in which the apparently outgoing Chief Justice only added to the ambiguity over his resignation, prompting Robert C. Byrd of West Virginia to announce that he was ‘reconsidering his position in light of Warren being able to choose his successor.’<sup>38</sup>

Before long, Senators were debating the potential problems of the unusually close relationship between Fortas and Johnson.<sup>39</sup> During the second day of hearings, 12<sup>th</sup> July, Michigan’s junior Senator, Republican Robert Griffin, put forward his opposition to Fortas in bold terms when he claimed that ‘the argument has been advanced that if a “crony” – nominated because he is a “crony” – is “qualified”, he should be approved. I reject such a view because it demeans the Senate and the Supreme Court.’<sup>40</sup> Republican Senator Everett Dirksen of Illinois, who, as the most influential Republican leader in the Senate, enjoyed an amicable and productive relationship with Lyndon Johnson, responded to the arguments of others in his party by claiming that he found the ‘lame duck’ term to be ‘offensive’, adding that most if not all of President Harry S. Truman’s Supreme Court nominees were also cronies, including Justice Harold Hitz Burton, who had sat next to Truman in the Senate, and Chief Justice Fred Vinson, with

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<sup>37</sup> *Ibid.*, p.38.

<sup>38</sup> Murphy, *Fortas*, p.365.

<sup>39</sup> William G. Ross, ‘The Functions, Roles And Duties of the Senate in the Supreme Court Appointment Process’, *William and Mary Law Review* 28 (1986-7), pp.633-682, p.655; Michael Comiskey, *Seeking Justices* (Lawrence, KS: University Press of Kansas, 2004), p.67.

<sup>40</sup> Hearings, 12<sup>th</sup> July 1968, p.47.

whom Truman had regularly played poker.<sup>41</sup> Nonetheless, Griffin proved fearless in expressing his opposition to the nominee, making clear that 'I do not condemn Mr Fortas because he has been Mr Johnson's personal lawyer and his advisor throughout much of his personal career ... But, Mr Chairman, I do raise the question whether Mr Fortas should be rewarded with the position of Chief Justice of the US Supreme Court because he performed such services as a friend of Lyndon Johnson.'<sup>42</sup> Michigan's senior Senator, the inimitable Democrat Philip Hart, expressed regret that his Senate colleague felt so strongly in his opposition to Fortas, declaring, 'I just happen to think that America can be a little proud of itself that there is a man like Abe Fortas in our land, and that this nation affords to such an individual full opportunity to advance. But, having said that, I know that Bob will not say Amen, so I have no more to say.'<sup>43</sup> Three days later, President Johnson discussed his concerns over the Republican opposition with Everett Dirksen in a telephone call, urging his ally, 'don't let them filibuster this.' Although he responded with 'I won't', Dirksen admitted that 'I couldn't straighten out Strom, and neither could Jim Eastland.'<sup>44</sup>

As with the events of Thurgood Marshall's confirmation hearings, covered in the previous chapter, Thurmond had little to say during the initial phase of the hearings, almost as though he considered John McClellan and Sam Ervin to be warm-up acts. When the nominee finally appeared before the committee, on 16<sup>th</sup> July 1968, he was introduced by Democratic Senator Albert Gore, from Fortas's home state of Tennessee.<sup>45</sup> Kicking off by enquiring into the nominee's relationship with the President, and then asking Fortas for his view on whether the Supreme Court should 'bring about social, economic or political changes', James Eastland's line of questioning appeared to have changed little since he assumed the chairmanship of the Committee in 1956.<sup>46</sup> John McClellan picked up

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<sup>41</sup> *Ibid.*, p.52.

<sup>42</sup> *Ibid.*, p.56.

<sup>43</sup> *Ibid.*, p.61.

<sup>44</sup> Telephone conversation between Lyndon B. Johnson and Everett Dirksen, 15<sup>th</sup> July 1968, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6807.01).

<sup>45</sup> Hearings, 16<sup>th</sup> July 1968, p.100.

<sup>46</sup> *Ibid.*, p.104-5.

this line of interrogation, before Sam Ervin began a lengthy and in-depth dialogue with the nominee on various aspects of constitutional law. By the following day's hearings, Ervin was pursuing a familiar line of inquiry by grilling the nominee on the *Miranda* decision – in which the Court had underlined the necessity of suspects being made aware of their constitutional rights – with Fortas's uncomfortable responses sounding eerily similar to those of Marshall:

**Senator Ervin:** The thing that puzzles me, and it is beyond my power of comprehension, is that if the Constitution means what it was meant to mean in the *Miranda* case, why one of the smart judges who had sat on the Court during the preceding one hundred and seventy-six years did not discover that.

**Justice Fortas:** Senator, again, much as I would like to discuss this, I am inhibited from doing it.<sup>47</sup>

When Thurmond's chance to question the nominee finally came, on 18<sup>th</sup> July, he preceded his interrogation with the declaration that, 'in the last decade and a half, the Court has made so many decisions affecting the lives of the American people in very fundamental ways that it would seem to me that the Senate, as representatives of the people, is entitled to consider these views.'<sup>48</sup> While this brief statement may have been intended as a pre-emptive strike against the same voices that had condemned the behaviour of Thurmond and Olin Johnston as Judiciary Committee members during previous hearings, the words used gave no warning of what was to follow. Without wasting time on the technicalities of the US Constitution, Thurmond cut straight to one of the most controversial issues in the South following the passage of the Voting Rights Act, namely, the issue of state control over voting procedures. In targeting the Court's *Katzenbach v. Morgan* decision (1966), which recognised, and ruled as constitutional, the power of Congress to enforce the equal protection guarantees of the Voting Rights Act, Thurmond was not shy in referring to the use of literacy tests in Southern state voting regulations:

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<sup>47</sup> Hearings, 17<sup>th</sup> July 1968, p.173.

<sup>48</sup> Hearings, 18<sup>th</sup> July 1968, p.180.

**Senator Thurmond:** Under the reasoning of the majority in the Morgan case, are not the states prevented from exercising an otherwise constitutional legislative prerogative, such as the requirement of literacy in the English language, merely because the Congress declares otherwise?

**Justice Fortas:** Senator, with all deference, I must ask you to understand and to excuse me from addressing myself to that question. I do so only because of my conception of the constitutional limitations upon me ... as a Justice of the Supreme Court, I am under the constitutional limitation that has been referred to during these past two days, and must respectfully ask to be excused from answering.<sup>49</sup>

Having been briefed by the Justice Department on how to conduct himself during the hearings, Fortas continued to provide diplomatic answers which acknowledged, albeit apologetically, the limitations of his ability to offer his views on the issues under discussion.<sup>50</sup> In attempting to portray Fortas's non-committal responses as an outright refusal to clarify his views, Thurmond segued happily into the issue of Fortas's close relationship with Lyndon Johnson:

**Senator Thurmond:** You have expressed your views to the President when he has called you down there, and over the telephone, haven't you?

**Justice Fortas:** No, sir. Never.

**Senator Thurmond:** And he got the benefit of your views on these matters, did he not?

**Justice Fortas:** Never.

**Senator Thurmond:** Why shouldn't a Senator have the benefit of your views?

**Justice Fortas:** I have never, never been asked by the President. Nor have I expressed my views on any pending or decided case. Never, Senator, never.<sup>51</sup>

This line of questioning succeeded in provoking more definite responses from Fortas, but Thurmond would soon return to the subject of literacy tests. In yet another parallel with the Marshall hearings – during which the Senator asked the nominee repeatedly if he understood the question, and also inquired into

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<sup>49</sup> *Ibid.*, p.181.

<sup>50</sup> Murphy, *Fortas*, p.370.

<sup>51</sup> Hearings, 18<sup>th</sup> July 1968, p.182-3.

whether or not he had ‘anything to add’ to his more detailed answers – Thurmond began a routine of hurling questions at Fortas and following up the nominee’s non-committal answers by asking repeatedly, ‘and you refuse to answer the question?’

**Senator Thurmond:** Mr Justice Fortas, if Congress were to pass a law prohibiting literacy tests for voting in all states – and I gather you believe such tests to be unwise – would it be your opinion that, if this matter came before the Court, the proper questions would be whether this was appropriate legislation under Section 5 of the 14<sup>th</sup> Amendment, even if such legislation were constitutional in the absence of congressional action?

**Justice Fortas:** I am afraid I have to make the same answer, if I have followed that correctly, Senator.

**Senator Thurmond:** You refuse to answer the question?

**Justice Fortas:** Yes, sir.

**Senator Thurmond:** What is your answer?

**Justice Fortas:** I said, yes, sir, for the same reason.

**Senator Thurmond:** Mr Justice Fortas, in all but a very few states, a person must be 21 years of age in order to vote. Suppose Congress passed legislation, not an amendment to the Constitution, lowering this to 18, based on findings that certain racial groups have a greater percentage of persons in the 18-to-20 age bracket. Is there anything in the reasoning of the majority in the Morgan case which would prevent congressional action overriding the state’s judgements on this matter?

**Justice Fortas:** For the same reason – because of constitutional limitations upon me – I must decline to address myself to that.

**Senator Thurmond:** So you refuse to answer that question?

**Justice Fortas:** I have so stated. Yes, sir.<sup>52</sup>

With Fortas following successfully the same calm and collected approach demonstrated the previous year by Thurgood Marshall, Thurmond eventually became agitated, with his comments bordering on sarcasm:

**Senator Thurmond:** Would you consider your dissent in *Fortson v. Morris* to be an example of translating a personal preference into a constitutional requirement?

**Justice Fortas:** I most certainly would not, but I should not say that. I must stand on the constitutional position. I cannot respond to that, Senator.

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<sup>52</sup> *Ibid.*, p.183-4.

**Senator Thurmond:** I thought you did respond.

**Justice Fortas:** I am sorry. It was inadvertence.

**Senator Thurmond:** Well, maybe we need more inadvertent answers here this morning.

**Justice Fortas:** It is pretty hard not to make them, Senator, as I am sure you will understand. I just repeat – this is not a pleasant role for me.<sup>53</sup>

With the Senator offering no sympathy for the nominee's situation, Thurmond moved swiftly on to a range of other cases from the Warren Court era, from the controversial *Miranda* to the much-hated *Baker v. Carr* (1962) and to the lesser-known case of *Berger v. State of New York* (1967), which had been flagged up by Fritz Hollings in one of his letters to Thurgood Marshall the previous summer. Despite having told a supporter that 'I have decided that my questions should be limited to the record which Justice Fortas has made since coming to the Court', Thurmond could not resist raising the case of *Mallory v. United States* (1957), which, for him, constituted perhaps the most blatant example of the Justices' 'concern for the rights of Communists and criminals, including rapists and murderers.'<sup>54</sup> The inclusion in the hearings of questions relating to the *Mallory* decision, the background to which was covered in Chapter Two, is significant if only because, in the words of Jim Newton, 'the facts [of the case] were so clear that even the Court's conservatives joined the opinion, and Fortas had absolutely nothing to do with it.'<sup>55</sup> The confession of black South Carolinian Andrew Mallory for the rape of a white woman – and the Justices' subsequent decision to throw out his conviction due to a lack of probable cause – had been mentioned frequently by Thurmond in speeches and newsletters over the years, and on this occasion, he remained unperturbed by the fact that the case was decided eight years before Fortas took his seat on the Supreme Court. Nonetheless, Thurmond's questions on *Mallory* cascaded violently into the infamous thundering rant which has, over time, become the defining moment of the Fortas hearings:

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<sup>53</sup> *Ibid.*, p.189.

<sup>54</sup> Crespino, *Strom Thurmond's America*, p.108.

<sup>55</sup> Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York, NY: Riverhead, 2007), p.495.

**Senator Thurmond:** Does not that decision – Mallory – I want that word to ring in your ears – Mallory – the man happened to have been from my state, incidentally – shackle law enforcement? Mallory, a man who raped a woman, admitted his guilt, and the Supreme Court turned him loose on a technicality. And who I was told later went to Philadelphia and committed another crime, and somewhere else, another crime, because the courts turned him loose on technicalities. Is not that type of decision calculated to encourage more people to commit rapes and serious crimes? Can you, as a Justice of the Supreme Court, condone such a decision as that? I ask you to answer that question.<sup>56</sup>

Thurmond's obsession with the Court's prevention of what he saw as the justified punishment of a black male for the rape of a white woman recalled the rage of his boyhood hero, Coleman Blease, who regularly endorsed the lynching of African Americans as a means of defending the honour of Southern white women. Blease had infamously declared, 'whenever the Constitution comes between me and the virtue of the white women of the South, I say to hell with the Constitution!'<sup>57</sup> Like Blease, Thurmond defended the honour of Southern white women, but never endorsed lynching and never dismissed the Constitution. Rather, he employed the very opposite tactic of speaking of the Constitution as a sacred document in order to hold judicial nominees to account. While Blease preached from the stump, Thurmond's aggression was channelled into an institutional process of interrogating the individuals responsible for determining the outcome of judicial questions relating to race, crime, civil rights, and other issues which remained as relevant in the South Carolina of the 1960s as they had been when Blease occupied Thurmond's Senate seat during the 1920s.

Reporters noticed Fortas glance over at Chairman Eastland, who was apparently reading and did not look up.<sup>58</sup> As with the previous year's hearings on the nomination of Thurgood Marshall, the Mississippi Senator seemed happy to allow Thurmond off the leash.

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<sup>56</sup> Hearings, 18<sup>th</sup> July 1968, p.191.

<sup>57</sup> W.J. Cash, *The Mind of the South* (New York, NY: Alfred A. Knopf, 1941), p.260.

<sup>58</sup> Jack Bass and Marilyn W. Thompson, *Strom: The Complicated Personal and Political Life of Strom Thurmond* (New York, NY: Public Affairs, 2005), p.204; Laura Kalman, *Abe Fortas: a Biography* (New Haven, CT: Yale University Press, 1992), p.340; Crespiño, *Strom Thurmond's America*, p.217.



**Justice Fortas:** Senator, because of my respect for you and my respect for this body, and because of my respect for the Constitution of the United States, and my position as an Associate Justice of the Supreme Court of the United States, I will adhere to the limitation that I believe the Constitution of the United States places upon me and will not reply to your question as you phrased it.

**Senator Thurmond:** Can you suggest any other way in which I can phrase that question?

**The Chairman:** Let us have order.

**Justice Fortas:** That would be presumptuous. I would not attempt to do so.

**Senator Thurmond:** Would you care to make any comment at all on this question?

**Justice Fortas:** Not as phrased, no, sir.

**Senator Thurmond:** Well, as phrased differently, would you care to make any comment?

**Justice Fortas:** No. No, Senator.<sup>59</sup>

As with his record-breaking filibuster against the Civil Rights Act of 1957, Thurmond's outburst over *Mallory* would confuse, rather than satisfy, many who were ordinarily to be found on the Senator's side. As Fritz Hollings later commented, his colleague's theatrical interrogation of Fortas 'had left even some of his own staffers shaking their heads.'<sup>60</sup>

The correspondence sent to Thurmond's office following the *Mallory* rant suggested a very mixed reaction. While one writer declared that 'I am ashamed for myself and my country that you are a United States Senator' and another claimed that 'I think your actions concerning Justice Fortas are reprehensible', former South Carolinian Congressman – and fellow defector to the Republican Party – Arthur Ravenel Jr, offered 'just a quick line to tell you what a great job you're doing on Abe Fortas – give him hell – he deserves it.'<sup>61</sup> Another writer requested a copy of 'Senator Thurmond's recent speech', to which Thurmond responded with the unintentionally amusing clarification that 'the discussion of

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<sup>59</sup> Hearings, 18<sup>th</sup> July 1968, p.191-2.

<sup>60</sup> Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008), p.142.

<sup>61</sup> Letter from Richard R. Zukowski to Strom Thurmond, 24<sup>th</sup> July 1968; letter from Mrs Clarence A. Watkins to Strom Thurmond, 3<sup>rd</sup> October 1968; Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 23, Folders 3[-1] and 3[-2]; note from Arthur Ravenel jr to Strom Thurmond, 19<sup>th</sup> July 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 21, Folder 4.

the Mallory decision was not in a speech but rather in the form of my questioning of Justice Fortas in the Judiciary Committee.<sup>62</sup>

On the very same day that Thurmond was making political history with his *Mallory* outburst, South Carolina's junior Senator was offering a more dignified explanation for his opposition to the Fortas nomination. In a lengthy speech in the Senate, Hollings linked Fortas to Chief Justice Warren and the 'Warren philosophy', but at the same time condemned Republican filibuster plans. Significantly, he opted not to mention his fellow Senator from South Carolina even once during the speech, and instead claimed that those behind the filibuster plans chose Senator Robert Griffin of Michigan and the Republican presidential candidate, Richard Nixon, as the leaders of their 'manifesto'.<sup>63</sup> As with his cautious statements on Thurgood Marshall, covered in the previous chapter, Hollings's Senate speech on Fortas provides an indication of his well-developed skill in occupying tricky political positions. Having received several letters urging him to support Thurmond's filibuster efforts, Hollings was careful not to mention, let alone criticise openly, his fellow South Carolinian, while at the same time managing to distance himself from the filibuster plans by emphasising the relevance of party politics. Similarly, he was careful to keep up a united South Carolinian front by linking Fortas repeatedly to the much-hated Earl Warren while at the same time refusing to recognise the 'lame duck' description of the incumbent Democratic President.<sup>64</sup> By Hollings's logic, the defeat of the Fortas nomination was in the best interests of South Carolina, but the shabby political tactics of certain Republican Senators were in the best interests of no-one, even though they were aimed at the same outcome. Perhaps inevitably, his complex position left him open to criticism, particularly as Republican Marshall Parker, who

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<sup>62</sup> Letter from Kenneth W. Akers to Strom Thurmond, 26<sup>th</sup> July 1968; letter from Strom Thurmond to Kenneth W. Akers, 30<sup>th</sup> July 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 21, Folder 5.

<sup>63</sup> Speech of Hon. Ernest F. Hollings of South Carolina in the Senate of the United States, 18<sup>th</sup> July 1968, Congressional Record, Proceedings and Debates of the 90<sup>th</sup> Congress, Second Session, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>64</sup> Letter from John R. Allen to Ernest 'Fritz' Hollings, 2<sup>nd</sup> July 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

had lost narrowly to Hollings in the 1966 special election following the death of Olin Johnston, was keen to use the Fortas affair to criticise Hollings during a second run against him in 1968. Claiming that 'this is another case where Hollings is talking out of both sides of his mouth', Parker remarked that 'Hollings has attacked Supreme Court decisions on many issues and now he won't do enough to change them by helping block the nomination.'<sup>65</sup>

Thurmond's outburst over the *Mallory* case played a critical role in the development of Supreme Court nomination hearings into major public events, but it was not the only notable exchange to take place during the lengthy Fortas Chief Justice hearings. On the following day, 19<sup>th</sup> July, Thurmond continued to question Fortas on matters relating to law and order. One of the questions proved to be remarkably straightforward, yet Thurmond preceded it by quoting an incredibly lengthy extract from a speech entitled 'Law, Order and the High Court', which Chief Justice John C. Bell of the Supreme Court of Pennsylvania had given ten days earlier. In what must have been an excruciating experience, Fortas waited patiently for nearly ten minutes for Thurmond to complete the extract, after which the Senator asked if the nominee agreed 'that the recent decisions of a majority of the Supreme Court of the United States, which shackle the police and courts and make it terribly difficult to protect society from crime and criminals, are among the principal reasons for the turmoil and near-revolutionary conditions which prevail in our country and especially in Washington?'<sup>66</sup> Finally, Fortas was able to respond, and his polite one-word answer – 'No' – provoked an outburst of applause from some in the room, leading Chairman Eastland to call for order.<sup>67</sup> An unimpressed Thurmond commented, 'I understood there had been recruiting actions to bring people here today which would try to cause such a demonstration, Mr Chairman, but I did not believe it until I now see what is happening in the back of the room', prompting Senator Philip Hart to clarify for

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<sup>65</sup> Briefing of news release from Greenville paper, 11<sup>th</sup> July 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>66</sup> Hearings, 19<sup>th</sup> July 1968, p.219.

<sup>67</sup> Kalman, *Fortas*, p.341.

the record – as stated fully at the beginning of this chapter – his observation that ‘everybody looks nice and clean and fine and fresh’.<sup>68</sup>

**The Chairman:** We are not going to have demonstrations at these committee hearings.

**Senator Hart:** The demonstration consisted of mild scattered applause for a statement that I would have applauded myself.

**The Chairman:** But you did not, Senator.

**Senator Hart:** Happily, I can speak for the record. My impression of the Bill of Rights is that it was intended to handcuff government. That is the whole purpose of the Bill of Rights. It might mean one thing – if you cannot hit somebody over the head or hold him for as long as you want – for a policeman but we are all better because you cannot.

**Senator Thurmond:** Mr Chairman, I have not yielded, but I will be glad to yield to the Senator from Michigan if he wishes to say any more.

**The Chairman:** Proceed.

**Senator Thurmond:** Would you care to say anything further?

**Senator Hart:** Yes. But I will resist the temptation, just the way Justice Fortas has.<sup>69</sup>

The outbreak of applause, along with the comments of Philip Hart, suggested strongly that some were rooting for Abe Fortas in his showdown with Strom Thurmond, but the Senator’s personal goal of preventing Fortas’s confirmation was still within reach. Despite concluding his interrogation by assuring Fortas that his questions ‘have not been the result of personal ill will toward you’, Thurmond would soon find a new and surprisingly effective angle in his war against the Supreme Court, ensuring that his plan to make Abe Fortas the prize casualty would ultimately be fulfilled.<sup>70</sup>

### **‘Pornography’ Sounds Bad**

Maintaining his view that no vacancy existed for an Associate Justice while Abe Fortas continued to serve on the Court, Thurmond skipped the 20<sup>th</sup> July hearing,

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<sup>68</sup> Hearings, 19<sup>th</sup> July 1969, p.219.

<sup>69</sup> *Ibid.*, p.219-20.

<sup>70</sup> *Ibid.*, p.247.

during which Homer Thornberry was questioned. He re-appeared on 22<sup>nd</sup> July but declined to question Thornberry on the grounds that 'Chief Justice Warren has never submitted a firm resignation. The President of the United States has never made a firm acceptance. So in my opinion, there is no vacancy.'<sup>71</sup> Following objections to Fortas's confirmation from Michael D. Jaffe of Liberty Lobby, who had also opposed Marshall's confirmation the previous year, the Committee heard from James J. Clancy, attorney for the executive board of the National Organisation for the Citizens Council for Decent Literature, Inc., who condemned the Justices' inconsistent rulings on the issue of obscenity and placed Abe Fortas at the centre of the Supreme Court's supposedly liberal attitude toward 'obscene' materials.<sup>72</sup> In highlighting a range of 'sex paperback books' considered by the Justices in 1966, with titles such as *Lust School*, *Orgy House*, *Flesh Pots*, *Passion Priestess*, *Sin Warden* and *Flesh Avenger*, and also a 14-minute striptease film by the name of *O-7*, which Fortas had considered not to be obscene in the *Schackman v. California* decision of 1967, Clancy requested that 'the individual Senators view and consider these materials before they cast their votes in this matter.'<sup>73</sup>

Thurmond questioned Clancy with enthusiasm. In commenting on the fact that the Justices appeared to reach very different conclusions when studying the materials, despite all of them applying the same judicial tests, Clancy explained that the *O-7* film was ruled as obscene by Justices Warren, Brennan, Harlan and Clark, 'but when it came to still photographs of the same type of activity, for example, a woman thrusting her vagina forward, or showing an invitation to sexual intercourse in still, Justice Brennan said that it was not obscene.'<sup>74</sup> Thurmond appeared more interested in the impact of the Court's handling of such material on the issue of accessibility:

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<sup>71</sup> *Ibid.*, p.282.

<sup>72</sup> *Ibid.*, p.291.

<sup>73</sup> Hearings, 22<sup>nd</sup> July 1968, p.294-7.

<sup>74</sup> *Ibid.*, p.300; p.304.

**Senator Thurmond:** Now, as long as the publishing houses who produce this smut material can get decisions like were handed down by the Supreme Court, will not this encourage them to go even further and further, and produce even more obscene material if it is possible to do so ?

**Mr Clancy:** Yes, sir. They have already done that. Not only that. They have gone further in the area of exhibition, as I have mentioned. Previously, these films would be sold in certain locations. Now they are going into the liquor, into the bars. You will see signs in Los Angeles which say "Girlie Films." In a bar, they have a little projector, and will throw these films on the wall. This has replaced the topless situation. This is one use of the film.<sup>75</sup>

Clancy's testimony proved to be sufficiently compelling for Thurmond to undertake further investigations, the result of which became evident the following day, when members of the Judiciary Committee were given the opportunity to question Deputy Attorney General Warren Christopher. Having accused Christopher of being sent to the hearings as a deliberate Justice Department move to defend the nominee, Thurmond raised the provocative question of whether Fortas had effectively exercised his right to silence under the Fifth Amendment by 'refusing' to answer the Committee's questions, which Christopher denied.<sup>76</sup> But Thurmond's real agenda became clear when he declared to Christopher that he had sent a member of his staff to find out if obscene material was available to purchase on the streets of Washington, DC. Making full use of the exhibits before him, Thurmond's line of questioning once again reached theatrical proportions when he asked:

Isn't that disgraceful? Hand that down, let him see that. And here is another one entitled *Friendly Females*. Now, the last three that we just handed you were picked up by a member of my staff today, Tuesday, the 23<sup>rd</sup> of July, 1968 ... Mr. Christopher, how much longer are the parents, the Christian people, the wholesome people, the right-thinking people, going to put up with this kind of thing? How much longer should they do it?<sup>77</sup>

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<sup>75</sup> *Ibid.*, p.306.

<sup>76</sup> Hearings, 23<sup>rd</sup> July 1968, p.354-364.

<sup>77</sup> *Ibid.*, p.359.

In arguing that the Justices were facilitating the distribution of obscene materials in various five-to-four decisions, Thurmond turned his questioning into a lengthy and impassioned plea for decency:

**Senator Thurmond:** Does it shock you that this material is so readily available in the city in which you live and in most of the cities of the nation?

**Mr Christopher:** No, I am not surprised by it, Senator.

**Senator Thurmond:** You are not surprised by it, in view of the decisions by the Supreme Court permitting it to be sold?

**Mr. Christopher:** Were you asking a question, Senator?

**Senator Thurmond:** You say you are not surprised because the decisions of the Supreme Court permit it to be sold, or do you think the material is alright for the public to buy?

**Mr Christopher:** I just answered, Senator, that I was not surprised to see that magazines like this were on sale at newsstands.

**Senator Thurmond:** I ask you why, upon what your answer is based. Why are you not surprised at this filthy, obscene material which you are now looking at, or were just a moment ago?

**Mr. Christopher:** Because it has become commonplace in our society, not only in the United States, but elsewhere for there to be magazines of a girlie character.

**Senator Thurmond:** And why is it commonplace? Because the Supreme Court has made it commonplace, hasn't it?

**Mr. Christopher:** No, I think the Supreme Court is only following the Constitution as best they know how to do so, sir.<sup>78</sup>

It is perhaps ironic that Thurmond's forceful condemnation of materials 'of a girlie character' overshadowed the valid, if not altogether powerful, arguments of James Clancy regarding the Justices' inconsistent interpretation of what constitutes obscene material. The recurring problem of how to define obscenity was never more evident than in the *Jacobellis v. Ohio* decision of 1964, which included Justice Potter Stewart's declaration, 'I know it when I see it', a phrase which became so infamous that Stewart later predicted it would be engraved on his tombstone.<sup>79</sup> Justice Hugo Black later commented that 'I understand that "pornography" sounds bad. It really sounds bad. But I never have seen anybody

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<sup>78</sup> *Ibid.*, p.360.

<sup>79</sup> Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon and Schuster, 1979), p.11; p.242.

who can say what it is.’<sup>80</sup> While it was easy for Thurmond to prove that ‘this filthy, obscene material’ was easily accessible, it was difficult for the Justice Department or anyone else to defend the Court’s obscenity decisions because, as Senator George Smathers of Florida explained to President Johnson by telephone, so few of these cases included written opinions.<sup>81</sup> He might have added that the vague and amusing statements of the individual Justices on the issue of obscenity could hardly be held up as examples of judicial restraint or sound constitutional theory, nor could they be used to offset Thurmond’s laughable claim that ‘the effect of the Fortas decisions has been to unleash a floodtide of pornography across the country.’<sup>82</sup>

Thurmond’s role in the Fortas debacle was once again underlined on 3<sup>rd</sup> August, when a bruised Abe Fortas made a speech before the American College of Trial Lawyers, during which he made the claim that when Justices are called to account for their views, the independence of the Judiciary is threatened. As James A. Thorpe has explained, ‘Thurmond was not mentioned by name [but] the text of [Fortas’s] speech left little doubt that the Justice was referring to the line of questioning followed by the Senator and the Committee.’<sup>83</sup> With the nation’s press also emphasising Thurmond’s role at the centre of the Fortas hearings, it became inevitable that the political relationship between South Carolina’s senior Senator and the Republican nominee for President, Richard Nixon, would come under scrutiny. Nixon had been invited to South Carolina by Harry Dent, Chairman of the state’s Republican Party and Thurmond’s former advisor, as far back as February 1966, to build on Barry Goldwater’s victory in the five Deep South states in the 1964 Presidential Election.<sup>84</sup> During the Republican National Convention in Miami, at which Thurmond made his controversial ‘law and order’ comments, a

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<sup>80</sup> Hugo Black interview with Eric Sevareid and Martin Agronsky, CBS News, The Phoenix Learning Group, Inc [https://www.youtube.com/watch?v=HAgQdeup2v0].

<sup>81</sup> Crespino, *Strom Thurmond’s America*, p.218.

<sup>82</sup> Newsletter from the office of Senator Strom Thurmond, 5<sup>th</sup> August 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, box 21, Folder 6.

<sup>83</sup> James A. Thorpe, ‘The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee’, 18 *Journal of Public Law* (1969), pp.371-402, p.394.

<sup>84</sup> ‘Harry Dent, The President’s Political Co-Ordinator, Says: “I Gave Thurmond 100% Loyalty and Now I Give Mr Nixon 100%’, *The New York Times*, 1<sup>st</sup> February 1970, p.SM7.



story by Drew Pearson emerged, in which it was claimed that Nixon gave Thurmond an assurance that, once elected President, he would guarantee the nomination of Supreme Court Justices 'agreeable to the South', and that Thurmond would 'corral Southern delegates' in return for an assurance that Nixon would not appoint a liberal Northerner as his running mate.<sup>85</sup> The article, published in various newspapers, made light of South Carolina's on-going war on the Court by pointing out that 'Thurmond is passionately interested in the Supreme Court [and] feels that the worst blot on American history in this century was the Supreme Court's desegregation ruling of 1954.'<sup>86</sup>

Although Thurmond denied that a deal had taken place, he would later become quite candid about his discussions with Nixon in letters to constituents, telling one resident of Great Falls that 'I have discussed the matter of appointing men who are dedicated to the Constitution to the Supreme Court with Richard Nixon. I am confident that his election would mean much sounder appointments to the Supreme Court than we have had recently.'<sup>87</sup> Whether or not an official agreement was reached, it was obvious to Thurmond and other Republicans that if the Fortas nomination could be debated throughout marathon hearings and then defeated, there was every possibility that there would be insufficient time for the 'lame duck' Johnson to make another nomination, meaning that a 'sound' conservative appointment could then be made by the incoming President Nixon.

Yet Thurmond was unimpressed by Nixon's inconsistent stand on the Fortas nomination during the summer of 1968. Despite criticising the Supreme Court regularly, the Republican candidate refused to offer unequivocal support for Republican efforts to prevent Fortas's confirmation. At a meeting of Southern delegations, Nixon reminded the audience that he had urged Johnson not to make the appointment, and offered his view that a Chief Justice 'should represent the mandate of the future and not the Johnson mandate of the past'. However, he

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<sup>85</sup> 'Nixon Gave Thurmond Supreme Court Veto', *The Lewiston Daily Sun*, 20 August 1968, p.4.

<sup>86</sup> *Ibid.*, p.4.

<sup>87</sup> Letter from Strom Thurmond to Reverend W.Y. Cooley, 9<sup>th</sup> September 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 22, Folder 11.

then declared his interest in nominees 'who are for civil rights' but who also understand the importance of law and order, adding, 'I think we need that kind of balance on the courts.'<sup>88</sup> Despite being knee-deep in pornographic material in his on-going condemnation of Abe Fortas, Thurmond was keen to ensure that the Fortas affair did not compromise Nixon's electability. In a letter to Nixon's future Attorney General, John Mitchell, the Senator made the case that 'in my judgment, it hurts Nixon, particularly in the South, when he takes a stand and then the next day appears to back off from it. With regard to the Fortas matter, he should stick to his original statement that it is a matter for the Senate to decide.'<sup>89</sup> He also passed on the message to his supporters that 'Richard Nixon has said that this is a matter for the Senate and has not attempted to influence this matter. With a majority of the Republicans and some Democrats, [Fortas's] nomination will be stopped.'<sup>90</sup>

The Republican candidate's cautious 'Southern strategy' on the campaign trail and the Senator's intensifying anti-obscenity drive proved to be a winning combination. With Nixon's ground-breaking presidential campaign kick-starting the Republican political takeover of the Southern states, and Thurmond's 'anti-smut' campaign highlighting an issue which galvanised conservatives and influenced the rise of modern Religious Right, the Nixon-Thurmond partnership formed an unstoppable political force in US politics, with Abe Fortas becoming, perhaps unwittingly, a symbol of liberal America gone out of control.<sup>91</sup>

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<sup>88</sup> Murphy, *Fortas*, p.466.

<sup>89</sup> Letter from Strom Thurmond to John Mitchell, 18<sup>th</sup> September 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 22, Folder 13.

<sup>90</sup> Letter from Strom Thurmond to George M. Forte, 23<sup>rd</sup> September 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 22, Folder 14.

<sup>91</sup> Crespino, *Strom Thurmond's America*, p.225.

## The Beginning of The End

With an imminent Senate filibuster, the Fortas affair was already a major political event. On the other side of the Atlantic, in London, *The Times* reported that 'Senator Ernest Hollings (Democrat, South Carolina) says that 16 Southern Democrats are ready to oppose the nomination [and] with the 18 Republicans claimed by Senator Robert Griffin, of Michigan, this would be enough to thwart any attempt to block a filibuster.'<sup>92</sup> The Republican determination to obstruct Fortas's nomination would only develop further momentum after Senator Gordon Allott of Colorado alleged that Fortas had played a part in amending an appropriations bill to provide for Secret Service protection of presidential candidates.<sup>93</sup> While the charges appeared to lack concrete evidence, the allegation did remind Senators of the unusually close relationship between the nominee and the President. Far more serious was the revelation, leaked to the press by Bob Griffin, that Fortas had been paid \$15,000 to teach a law school course at American University's Washington College of Law.<sup>94</sup>

Inevitably, Fortas was asked to re-appear before the Committee. Facing the dilemma of whether to appear for further hearings and therefore look as though he was there to answer for wrongdoing, or simply not appear at all and therefore risk looking as though he had something to hide, Fortas opted for the latter move, which dealt a blow to his credibility and offended members of the Committee.<sup>95</sup> As Thurmond commented in a letter to a constituent, 'in my judgment, had any member of the Executive Department been able to testify in such a way to help Justice Fortas, they would surely have done so. Instead, they allowed damaging evidence to go unrefuted. While their failure to appear does not "prove" the allegations, I believe it is reasonable to infer that it indicates they

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<sup>92</sup> 'Threat to Fortas Nomination', *The Times*, 26<sup>th</sup> July, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>93</sup> Murphy, *Fortas*, p.484-5.

<sup>94</sup> *Ibid.*, p.478.

<sup>95</sup> Paul A. Freund, 'Appointment of Justices: Some Historical Perspectives', *Harvard Law Review* 101 (1988), pp.1146-1163, p.1155.

were in no position to contradict the charges.’<sup>96</sup> In the absence of anyone offering to respond to the accusation of financial impropriety with regard to American University, Thurmond was free to demand further hearings as part of his anti-obscenity crusade. President Johnson tried to pressurise James Eastland to wind up the hearings, but Eastland claimed that Thurmond’s determination to block a vote on the nomination in order to call further witnesses made it impossible for him to get the nomination out of Committee.<sup>97</sup>

During a press conference, a frustrated Lyndon Johnson compared the Fortas affair to the struggle over the controversial nomination of Louis Brandeis in 1916, thus making the unspoken suggestion that anti-Semitism was the cause of the obstructionism of several Southern Senators.<sup>98</sup> Significantly, both Thurmond and Hollings were accused of anti-Semitism in letters sent to their respective offices by Fortas supporters.<sup>99</sup> One correspondent received a response from Alan Banov, Special Assistant to Senator Hollings, who explained that Hollings was ‘very concerned’ over accusations of anti-Semitism. Banov argued that ‘Senator Hollings is not and has never been anti-Semitic. He has long had many close Jewish friends and supporters, including myself ... There are many reasons for opposing the appointment of Fortas, and the Senator’s own rationale is clearly delineated in his speech. That speech ... cannot by any measure of imagination be construed as anti-Semitic. I, as a Jew, wanted to make that clear to you in this letter.’<sup>100</sup>

The injection of anti-Semitism accusations into the Fortas affair recalled Olin Johnston’s defence against the same charge during his opposition to Simon Sobeloff’s nomination to the Fourth Circuit Court of Appeals, as covered in Chapter Two.<sup>101</sup> However, on this occasion, there were unexpected and further-

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<sup>96</sup> Letter from Strom Thurmond to David G. Jennings, 23<sup>rd</sup> September 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 22, Folder 14.

<sup>97</sup> Crespino, *Strom Thurmond’s America*, p.218-9.

<sup>98</sup> Murphy, *Fortas*, p.481; Tribe, *God Save*, p.91.

<sup>99</sup> Letter from Mrs Clarence A. Watkins to Strom Thurmond, 3<sup>rd</sup> October 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 23, Folder 17.

<sup>100</sup> Letter from Alan Banov to William Hoffman, 6<sup>th</sup> August 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

<sup>101</sup> ‘Senate Action On Sobeloff Blocked’, *The Spartanburg Herald*, 29 June 1956, p.1.

reaching implications. According to Bruce Allen Murphy, Hollings was telephoned by a Jewish leader who made a half-hearted attempt to request the Senator's support for Fortas's confirmation. The Senator turned him down, but was then asked if he could arrange for fifty F-4 Phantom jets to be sent to Israel. When the news reached Lyndon Johnson that Jewish leaders were now bargaining for arms to Israel rather than corraling support for Fortas – whose devoutness as a Jew was questioned, particularly as he had 'married outside his faith' – one presidential aide made the desperate, but apparently serious, suggestion that prominent Jews might be won over by a picture of Fortas in a yarmulke.<sup>102</sup> Meanwhile, Thurmond remained unfazed by Johnson's suggestions of anti-Semitism, and responded simply by announcing that 'if President Johnson would take the necessary time to review four films – *Flaming Creatures*; *O-7*; *O-12*, and *O-14* – or any of them, it would be interesting to know if he still favors Mr Fortas's appointment.'<sup>103</sup> Thurmond had certainly been proactive in showing the material to other Senators. Following James Clancy's testimony before the Committee, the Senator had been arranging regular screenings of the material, dubbed the 'Fortas Film Festival' – a move that Johnson claimed to Eastland was making Senators look ridiculous.<sup>104</sup>

In a final bid to save Fortas's nomination, Philip Hart prepared a letter to Chairman Eastland, with the intention of generating a sufficient number of signatures to persuade the Mississippi Senator to conclude the hearings. When he came up one signature short, Hart was unable to persuade anyone, including Committee members Thomas Dodd of Connecticut and Hiram Fong of Hawaii, and, significantly, Republican leader Everett Dirksen of Illinois, to sign the letter.<sup>105</sup> When Bob Griffin informed Thurmond of the American University payment allegations, the South Carolinian wasted no time in calling Dean B.J. Tennery of Washington School of Law to testify before the Judiciary Committee.<sup>106</sup> During his

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<sup>102</sup> Murphy, *Fortas*, p.366.

<sup>103</sup> *Ibid.*, p.481.

<sup>104</sup> Crespino, *Strom Thurmond's America*, p.222; Murphy, *Fortas*, p.480.

<sup>105</sup> Murphy, *Fortas*, p.490-1.

<sup>106</sup> Kalman, *Fortas*, p.351.



Figure 2. Cartoon from *The State*, 13<sup>th</sup> September 1968.

lengthy interrogation of Dean Tennery, Thurmond learned that the donations that paid for Fortas's seminars came from several high-profile business leaders, who 'could easily become involved in any number of suits which might reach the Supreme Court.'<sup>107</sup> In the words of Bruce Allen Murphy, 'the new set of hearings was now Strom Thurmond's show ... it was Thurmond who would become Abe Fortas's prosecutor. And destroying the nomination to him meant destroying the man himself.'<sup>108</sup> This view of Thurmond was very much in the American public consciousness by September 1968, when a cartoon in *The State* showed the Senator kneeling on a casket, wielding a hammer, with the caption 'A Coupla More Nails Should Do It.'<sup>109</sup>

<sup>107</sup> Crespino, *Strom Thurmond's America*, p.224.

<sup>108</sup> Murphy, *Fortas*, p.497-8.

<sup>109</sup> Cartoon from *The State*, 13<sup>th</sup> September 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 22, Folder 12.

An additional nail was provided by Everett Dirksen – Johnson’s critical Republican ally in the Senate – who eventually withdrew his support, conceding that the ‘dirty movies’ had damaged Fortas’s credibility.<sup>110</sup> Nonetheless, Jim Newton has argued persuasively that the Fortas episode threatened to reveal Dirksen’s waning influence over his party in the Senate, while Murphy has cited, in particular, ‘the upstart Griffin’s challenge to [Dirksen’s] authority.’<sup>111</sup> As Lyndon Johnson was discovering, the Senate was now a strikingly different institution to the one he had taken over as Majority Leader in 1955.

Concerned that his chances of building a filibuster-proof majority were ebbing away with alarming speed, Johnson resorted to vintage bargaining methods as a last-minute effort to whip up support for Fortas’s confirmation. As illustrated above by the example of his nominations of Robert W. Hemphill and Charles E. Simons to South Carolina’s Eastern District, the President was masterful in his understanding of the wants and needs of individual Congressmen, particularly when it came to the requests of Southerners for nominations of favoured individuals to positions of influence. Having offered to arrange the appointment of a Postmaster as a favour to Senator Russell Long of Louisiana, the President turned his attention toward a federal Court of Appeals appointment in Alabama, intended to encourage the support of Senator Lister Hill.<sup>112</sup> Although Johnson’s tactics had proved effective on countless occasions, his gestures proved woefully insufficient to save Abe Fortas in the complicated political climate of 1968. The sudden renewal of the President’s support for Arkansas’ milk industry did not prevent Senator John McClellan from casting a negative vote against the nominee on the Judiciary Committee, while Lister Hill was talked out of supporting Fortas by his old friend, fellow Alabamian Justice Hugo Black, whose rivalry with Abe Fortas on the Supreme Court has been well-documented.<sup>113</sup>

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<sup>110</sup> Crespino, *Strom Thurmond’s America*, p.224.

<sup>111</sup> Newton, *Justice for All*, p.496; Murphy, *Fortas*, p.521.

<sup>112</sup> Murphy, *Fortas*, p.365.

<sup>113</sup> Roger K. Newman, *Hugo Black* (New York, NY: Pantheon, 1994), p.589-90; Murphy, *Fortas*, p.364-5; p.535-41; Newton, *Justice for All*, p.474-6.

The death rattle sounded when Johnson's long-time friend and mentor, and leader of the Southern Democratic bloc in the Senate, Georgia's Richard Russell, fell out with the President when he grew tired of Johnson's repeated failure to nominate an old Russell family friend to Georgia's Southern District.<sup>114</sup> Interpreting Johnson's reluctance to nominate Alexander Lawrence as an arm-twisting tactic to ensure Russell's support for Fortas, the Georgian became so enraged that he told the President by letter that 'in view of the long delay in handling and the juggling of this nomination, I consider myself released from any statement I may have made to you with respect to your nominations', after which he telephoned Bob Griffin to offer his support against Fortas's confirmation.<sup>115</sup> In announcing his opposition to Fortas, Russell referred to the \$15,000 payment for the American University lectures as 'an exorbitant and unreasonable honorarium, even had it come from the resources of the school, but the evidence developed the fact that this money was raised by Fortas's former law partner from a handful of the wealthiest clients of this firm, who have some interest, direct or indirect, in almost every decision touching the economy of the country.'<sup>116</sup> Whereas Russell had slammed Thurmond's infamous 1957 filibuster, he was now turning his back on Lyndon Johnson by siding with the precise arguments made by Thurmond during his interrogation of Dean Tannery. The friendship between Johnson and Russell would never be repaired.<sup>117</sup>

When a motion to bring the Senate filibuster to a close and move the Fortas nomination to a vote failed to get the necessary two-thirds majority, Abe Fortas wrote to the President and formally requested that his name be withdrawn from consideration.<sup>118</sup> Johnson reluctantly complied, making Abe Fortas the first unsuccessful nominee for a seat on the US Supreme Court since President Herbert

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<sup>114</sup> Robert Mann, *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights* (Orlando, FL: Harcourt Brace and co, 1996), p.494-5.

<sup>115</sup> Neil D. McFeeley, *Appointment of Judges: The Johnson Presidency* (Austin, TX: University of Texas Press, 1987), p.219.

<sup>116</sup> News release from the office of Senator Richard B. Russell, 26<sup>th</sup> September 1968, Richard B. Russell Collection Subgroup C, Series 1: Dictation, Box 9, Folder 1.

<sup>117</sup> Mann, *Walls of Jericho*, p.498-9.

<sup>118</sup> R. Sam Garrett and Denis Steven Rutkus, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2009* (Congressional Research Service, 8<sup>th</sup> May 2009), p.36-7; Tribe, *God Save*, p.90-91; Freund, *Appointment of Judges*, p.1155.



Hoover's ill-fated nomination of John J. Parker in 1930.<sup>119</sup> With Homer Thornberry's nomination now a moot point, Fortas would continue to serve on the Court, as an Associate Justice, while the President resumed the process of selecting a new Chief Justice from scratch. In addition to the question of who would be selected, there was now a much more serious question concerning which President should make the nomination.

Mark Silverstein has attributed the failure of the Fortas nomination in part to the decline of the 'whales and minnows' system of seniority in Congress. The congressional elections of the 1960s had brought to the Senate a new breed of 'minnow' Senators – with modern political perspectives of US society, and a closer relationship with special interests – which would reduce considerably the impact of the seniority held by 'whales' such as Richard Russell and Everett Dirksen. This argument suggests that the Fortas affair signposted the decline of a rigid hierarchical Senate, resulting in the emergence of a volatile and unpredictable process for confirming judicial nominations.<sup>120</sup> The fact that Lyndon Johnson, with his traditional understanding of the structure of Congress, 'simply could not imagine that a band of renegade young Republican Senators would consider defying Everett Dirksen or that Richard Russell was no longer the behind-the-scenes master of the Senate' offers yet another in the long list of reasons for the failure of Fortas's nomination to become Chief Justice of the United States.<sup>121</sup>

On the other hand, there is little to suggest that the rigid hierarchical structure of the Senate had ever compromised the dogged determination of Senators from South Carolina. As previous chapters have shown, the Southern 'whale' Richard Russell proved no more effective in keeping Olin Johnston and Strom Thurmond in check during the years leading up to the Fortas debacle, with the South Carolinians exercising little restraint – and little regard for what Silverstein describes as the 'timeworn patterns of Senate decorum and behaviour' – when obstructing the nominations of Simon Sobeloff (to the Fourth Circuit),

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<sup>119</sup> Mark Silverstein, 'The People, the Senate, and the Court: The Democratization of the Judicial Confirmation System', *Constitutional Commentary* 9 (1992), pp.41-58; p.42.

<sup>120</sup> Mark Silverstein, *Judicious Choices: The Politics of Supreme Court Appointments* (London: Norton, 1994), p.27-8.

<sup>121</sup> *Ibid.*, p.27.

Thurgood Marshall (to the Second Circuit, and later, the Supreme Court), and Abe Fortas, as Associate Justice, in 1965.<sup>122</sup> Joseph Crespino has noted that when Thurmond arrived in the Senate in 1955, he ‘chafed at the Senate custom of newcomers lying low’ and soon developed a frosty relationship with Lyndon Johnson, then Democratic Majority Leader, and his filibuster against the 1957 Civil Rights Act serves as a particularly potent reminder of his failure to show deference to Russell as leader of the Southern bloc.<sup>123</sup> It is unlikely that Lyndon Johnson would have been surprised by Everett Dirksen’s admission that neither he nor James Eastland could ‘straighten out Strom’ during the escalation of tensions during the Fortas hearings.<sup>124</sup>

It could be argued, however, that the Senate ‘whales’ were able only to minimise dissent rather than stamp it out completely. In this regard, the fact that South Carolina elected particularly cantankerous Senators who were largely unmoved by, if not immune to, the influence of the Senate’s traditions of seniority and hierarchy does not suggest a failure on the part of Russell, Dirksen, or Lyndon Johnson. Some Southern Senators proved more open to the influence of Presidents than others, as evidenced by Johnson’s cordial relationship with James Eastland, and his success in convincing Eastland, John Stennis and John McClellan to miss the final vote on Thurgood Marshall’s confirmation in 1967. The events of each controversial nomination suggest that the behaviour of South Carolina’s Senators may have been accepted by Presidents and Senate ‘whales’ as inevitable, constituting a level of damage worth accepting if it meant avoiding the proliferation of dissent elsewhere in the Senate. It is notable that no Senator from any other Southern state pursued a public one-man crusade against a judicial nominee throughout this era.

The emergence of a new wave of Republican Senators who did not identify as ‘minnows’ clearly did contribute to the outcome of the Fortas affair, but South Carolina’s role in the breakdown of Senate seniority, at least with regard to

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<sup>122</sup> *Ibid.*, p.31-2.

<sup>123</sup> Crespino, *Strom Thurmond’s America*, p.102-4

<sup>124</sup> Telephone conversation between Lyndon B. Johnson and Everett Dirksen, 15<sup>th</sup> July 1968, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6807.01).

judicial nominations, had begun long before the mid-1960s. In fact, it may even be argued that the traditions of seniority and hierarchy might actually have facilitated their uncompromising behaviour. As part of the 'whales and minnows' system, Presidents would deal first and foremost with the Chairman of the Judiciary Committee when attempting to speed action on their nominations and ensure safe passage to confirmation for their nominees. As a Deep South Democrat who shared the segregationist ideologies of the South Carolina Senators, James Eastland allowed Johnston and Thurmond free reign in waging war on the Court while at the same time maintaining cordial relationships with Presidents through his own dignified and diplomatic conduct as Chairman of the Committee. Had either Johnston or Thurmond assumed the position of Chairman during the period 1954-1970, it is highly unlikely that their actions would have had explosive consequences for the process of judicial nominations.

Strom Thurmond had long possessed the necessary drive, determination and ability to take advantage of complicated circumstances in a changing political environment, and his victory in the Fortas debacle proved that a Supreme Court nominee could be rejected after nearly forty years of successful confirmations. It also ensured, in spectacularly provocative Southern anti-Supreme Court rhetoric, that the role of South Carolina in the process of judicial nominations was far more evident in 1968 than at any time since the state's delegation had condemned the *Brown* decision in 1954. Despite declaring 'I feel that this is a great victory for our country' in letters to constituents, Thurmond did not appear satisfied by his hard-won effort, telling the Senate, 'I suggest Mr Fortas now go a step further and resign from the Court for the sake of good government.'<sup>125</sup> As Chapter Six will illustrate, this proved to be a very prescient comment.

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<sup>125</sup> Letter from Strom Thurmond to Commander Howard K. Williamson, 3<sup>rd</sup> October 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 23, Folder 16; Murphy, *Fortas*, p.525; Bass and Thompson, *Strom*, p.207.

### No Ordinary Time

Given Thurmond's highly influential role in the Fortas affair throughout the summer of 1968, it seems fitting that Richard Nixon was campaigning in South Carolina in the days leading up to President Johnson's official withdrawal of Fortas's nomination for Chief Justice. During stops in Greenville and Spartanburg, Nixon remained focused on his strategy of winning over the South, without adding his voice to the Republicans' gloating over Fortas. As *The New York Times* reported, 'under the watchful eye of Senator Strom Thurmond ... the Republican presidential nominee stuck to the themes that stir the Southland – law and order, the Vietnam War, the alleged collapse of American prestige abroad, and the need for a change in Washington.'<sup>126</sup> On 5<sup>th</sup> November 1968, Nixon was elected President of the United States. Although his victory over the Democratic candidate, Vice President Hubert H. Humphrey, constituted only 511,944 votes, the Republican 'Southern strategy' had paid off handsomely, with Nixon winning the states of Virginia, North Carolina, South Carolina, Tennessee, Kentucky, Oklahoma and Florida, with the remaining Deep South states being won over by former Alabama Governor George Wallace's segregationist campaign, and Humphrey winning only Texas and West Virginia.<sup>127</sup>

On the same day that Nixon triumphed in the nation, Fritz Hollings won re-election in South Carolina against a second challenge from Marshall Parker. Having beaten Parker by 11,753 votes in 1966, he increased his majority to a more convincing 155,280 votes two years on. Although Parker had attempted to characterise Hollings's caution over Fortas as 'talking out of both sides of his mouth', the Senator had succeeded in cultivating a masterful demonstration of South Carolinian independence during his first two years in the Senate, revealing a liberal tendency in his support for the state's textile industry but also a

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<sup>126</sup> 'Politics: Nixon, After Tour In South, Goes To Hartford Rally And Assails Inflation', *The New York Times*, 5<sup>th</sup> October 1968, p.20.

<sup>127</sup> Conrad Black, *Richard M. Nixon: A Life in Full* (New York, NY: Public Affairs Books, 2007), p.558.

conservative streak in his opposition to the Supreme Court nominations of Thurgood Marshall and Abe Fortas. With his well-crafted defiance of the Democratic establishment, and a well-developed understanding of the expectations of South Carolina's conservative white voters, Hollings neutralised Parker's attempt to link him with the liberal figure of Hubert Humphrey. Yet, at the same time, Hollings did benefit from Humphrey's popularity among black South Carolinians: *The New York Times* noted that while African Americans were particularly 'angered' by Hollings's opposition to Thurgood Marshall, there remained 'considerable enthusiasm for Mr Humphrey in the Negro community in South Carolina, and some leaders have dropped opposition to Mr Hollings to ensure that no votes are lost for the Vice President.'<sup>128</sup>

Although the failure of the Fortas nomination proved to be the last of several traumatic events during the final year of Lyndon Johnson's Presidency, the outgoing President had not yet given up. Returning to the suggestion made by Earl Warren nine months previously, the President began giving serious consideration to naming Arthur Goldberg as an interim Chief Justice in a recess appointment as part of a last-ditch attempt to take Warren out of the equation and prevent Richard Nixon from naming Warren's successor. Ironically, Johnson had lured Goldberg away from the Court in 1965 with the United Nations offer in order to create a vacancy for Abe Fortas. Goldberg was now enthusiastic to accept the post of Chief Justice, but Johnson soon re-considered the plan to nominate him when an aide discovered a statement, in which the President had criticised recess appointments.<sup>129</sup> Nonetheless, the President continued weighing up his chances of making another nomination. Briefly, he flirted with the idea of bringing back former Justice Tom Clark, who had vacated the Supreme Court the previous year in order to avoid a conflict of interest with the newly-appointed Attorney General, his son, Ramsey Clark. Following the suggestion of Johnson's friend Willard Deason that the nation would have 'a glow in its heart at the thought of the son now stepping down in deference to the father', Johnson telephoned Everett

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<sup>128</sup> 'Carolina Negroes Cool To Hollings', *The New York Times*, 4 November 1968, p.38.

<sup>129</sup> Stebenne, *Arthur J. Goldberg*, p.373.

Dirksen, whom he still believed to be his only realistic point of contact among Senate Republicans, and floated the idea of Clark's return, stressing that the appointment of the elder Clark as Chief Justice would be an attractive prospect for Southern Democrats and would also remove accusations of opportunism aimed at Republicans.<sup>130</sup>

**LBJ:** It would unify the country and wouldn't look like you all are playing politics trying to get a Justice. You're going to get Black, he's eighty-four, and he can't go on, and nobody on the Court really wants him to act because they don't know the stability there, they've got a problem.

**Dirksen:** Yeah.

**LBJ:** You've got Douglas, who's got a bad heart. You've got, uh, Harlan, who's got eye trouble. So you got three right there.

**Dirksen:** That's right.

**LBJ:** But a lot of folks feel that the Griffin effort was a pure political effort, particularly in the light of what you said. And he said nobody should serve, that the lame duck shouldn't appoint anybody.

**Dirksen:** Yeah, right.

**LBJ:** Now, if we took Clark, who just retired on account of his son and sent him up there as Chief, instead of letting Warren go on acting ... uh, the Southerners all urge me to name Clark as Chief because of his crime record and so on and so forth. McClellan and Eastland and them thought that he would be good.

**Dirksen:** Yeah.

**LBJ:** I would have to get me a new Attorney General.<sup>131</sup>

Despite suggesting that he would support a Clark nomination, Dirksen soon became sceptical of his party accepting any Johnson nominee, regardless of qualifications or suitability. James Eastland confirmed to White House Assistant Mike Manatos that a 'flat Republican policy of opposition' had indeed taken hold.<sup>132</sup> Having spent little time celebrating his victory in the Fortas affair, Thurmond was now turning his attention to the opposition of a new batch of five nominees for the lower courts, including Texas judge and long-time Johnson

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<sup>130</sup> McFeeley, *Appointment of Judges*, p.207.

<sup>131</sup> Telephone conversation between Lyndon B. Johnson and Everett Dirksen, undated, October 1968, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6810.01).

<sup>132</sup> McFeeley, *Appointment of Judges*, p.225.

associate, Barefoot Sanders.<sup>133</sup> On 10<sup>th</sup> December 1968, *The New York Times* published Thurmond's claim that Johnson's request for Congress to return for a 'special session' was motivated not so much by the President's interest in ratifying the Nuclear Non-Proliferation Treaty, signed in July, but his determination to get Arthur Goldberg back onto the Supreme Court.<sup>134</sup>

On the very same day, Johnson revealed to Chief Justice Warren – who was likewise inclined to prevent Nixon naming his successor – the true extent of the Republican pressure on him to avoid making a further appointment.<sup>135</sup> He claimed that Dirksen had offered Republican support for the ratification of the NPT in return for a guarantee that Goldberg would not be installed in a recess appointment, and also that Thurmond had offered to drop his opposition to several judicial nominees, including Barefoot Sanders, if Johnson would agree not to name an interim Chief Justice before Nixon's inauguration on 20<sup>th</sup> January 1969.<sup>136</sup> Regarding Goldberg, the President told Warren that:

I would be willing to name him if he could be appointed but I haven't got that evidence yet and I don't wanna have a tragedy as we did in the case of Abe ... People like Griffin and people like Fulbright and others who opposed Abe have said they would accept Arthur, but I have never felt that Russell and the Southern bloc and the Republican bloc would ever let him be confirmed, and Dirksen in effect told me that.<sup>137</sup>

Johnson's concern over the Southern bloc was no doubt influenced in part by the fact that his friendship with Richard Russell had still not been healed, and never would be. Neither Goldberg nor Clark was nominated as an interim Chief Justice. At the request of President-Elect Nixon, Earl Warren agreed to continue serving as Chief Justice until June 1969, allowing the new President plenty of time to make a careful selection of a 'strict constructionist' nominee, the like of which

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<sup>133</sup> *Ibid.*, p.225.

<sup>134</sup> 'Thurmond Reports a Johnson Retreat', *The New York Times*, 10<sup>th</sup> December 1968, p.40.

<sup>135</sup> Stebenne, *Arthur J. Goldberg*, p.371.

<sup>136</sup> Telephone conversation between Lyndon B. Johnson and Earl Warren, 10<sup>th</sup> December 1968, Lyndon Johnson Presidential Recordings, Miller Center, University of Virginia, (WH6812.01).

<sup>137</sup> *Ibid.* (WH6812.01).

he had promised throughout the campaign.<sup>138</sup> The intensity of the Republican determination to deny Lyndon Johnson the Chief Justice appointment was underlined three days after Richard Nixon's inauguration, when, in yet another victory for Thurmond, the new President withdrew the nominations of Barefoot Sanders and the other four lower court judges.<sup>139</sup> In announcing that he would 'ordinarily' have made another nomination but finally decided not to – as Warren's continued service would be in the best interests of government for the time being – a tired and dejected Lyndon Johnson noted that 'these are not ordinary times.'<sup>140</sup>

Having fought the Supreme Court for over a decade and failed to stop the nomination of a single judge, Thurmond's anger, energy, and theatrical style had finally been used to such devastating effect that it influenced the Senate in rejecting a Supreme Court nominee for the first time in thirty-eight years, leaving the Johnson Administration reeling. For two reasons, his victory in the Fortas affair signposted a turning point in South Carolina's war on the Supreme Court. Firstly, his tactics shifted from a defensive/obstructive role to an outright attempt to determine the selection of a new Chief Justice: not content simply to stop Abe Fortas from succeeding Earl Warren, Thurmond continued hammering the Johnson Administration in a bid to ensure that his political ally, Nixon, would make the next appointment. Secondly, the Court's record of exercising raw judicial power in a wide range of policy areas over the preceding decade allowed Thurmond to broaden and deepen his attack. By shifting the focus away from race and 'the Southern way of life' and emphasising constitutional interpretation, crime and punishment, and decency and obscenity, the South Carolinian was able, for the first time since 1955, to make a convincing case for the use of senatorial 'advice and consent' to restrict the power and political influence of the US Supreme Court. The exploitation of Johnson's mistake in trying to promote Fortas may be written off as political opportunism, but Thurmond's tactics proved

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<sup>138</sup> David A. Yalof, *Pursuit of Justices* (Chicago, IL: University of Chicago Press, 1999), p.99-100.

<sup>139</sup> McFeeley, *Appointment of Judges*, p.229.

<sup>140</sup> Newton, *Justice for All*, p.496.



considerably more successful than those employed in the 1950s, when Southerners were unable to convince their fellow Senators that the non-controversial Eisenhower nominees offered an equally dangerous threat. The fact that the Southern objections rested so heavily on regional interests in a period prior to the Court's rulings in *Baker*, *Engel*, *Miranda* and *Schackman* proved to be a further obstacle in overcoming their limited numbers in the Senate. The defeat of Fortas and the subsequent Republican success in preventing Johnson from naming the new Chief constituted a ground-breaking victory for conservative America. This triumph would now be built on after the inauguration of the new Republican President, who remained keen to develop his relationship with the South following the region's huge influence in his 1968 election victory. Thurmond's role in the Fortas rejection, and his influence in securing the Republican presidential victory, suggested strongly that South Carolinian voices would now be heard in the selection process for Richard Nixon's nominations to the Supreme Court.<sup>141</sup>

Fritz Hollings's first two years in the Senate, and his role in facilitating the peaceful integration of South Carolina, provided ample evidence of a strong political contrast with Strom Thurmond. But the Fortas affair demonstrated the difficulty in finding a meaningful ideological difference between the two Senators when it came to South Carolina's war on the Supreme Court. While Hollings claimed on 18<sup>th</sup> July 1968 that 'the Warren Court has not followed the principle of judicial restraint ... It has substituted the principle of judicial activism', Thurmond, two months later, outlined the view that 'judicial activism is one of the most dangerous legal concepts to appear on the scene in this century. The Supreme Court is supposed to interpret the law rather than create new law by amending the Constitution as it did in the *Miranda* case.'<sup>142</sup>

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<sup>141</sup> Edgar, *South Carolina*, p.546.

<sup>142</sup> Draft of statement by Ernest 'Fritz' Hollings, 18<sup>th</sup> July 1968, p.3, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings; letter from Strom Thurmond to John J. Tarpey, 18<sup>th</sup> September 1968, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), 3 (United States District, Circuit, and Supreme Court Judges), Year 1968, Box 22, Folder 13.

Within a very short space of time, Hollings had established a conservative record on the nomination of Supreme Court Justices that he would develop throughout his lengthy career in the Senate. As he explained in a 1968 newsletter when discussing the Court's judicial philosophy, 'Since the Justices do not run for office, how do the people "get at" the judges? How can this wrong be righted? The only way is for the United States to withhold confirmation.'<sup>143</sup> These words suggested strongly that Hollings understood only too well that the Supreme Court nomination process was, and remains today – years after the speeches, legislative efforts and provocative interrogations pursued by Thurmond and Olin Johnston – the ultimate political arena for questioning, challenging and scrutinising the power of the US Supreme Court. Hollings's role in the nominations of Robert Bork and Clarence Thomas, covered in Chapter Seven, highlights the fact that the world of judicial selection remained an effective outlet for demonstrating conservative credentials in order win re-election as a Southern Democrat Senator for nearly forty years in an increasingly conservative Deep South state. His consistent conservatism in the nominations process throughout the 1970s, 1980s and 1990s would be influenced in part by memories of his leading role in President Nixon's nomination of South Carolinian Clement F. Haynsworth to the Supreme Court, which is discussed fully in the following chapter.

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<sup>143</sup> Newsletter from the office of Senator Ernest 'Fritz' Hollings, 18<sup>th</sup> September 1968, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 104, Judiciary, Judges, Selection and Appointment, Supreme Court, Fortas, Abe, Statements, Hollings.

## **CHAPTER SIX:**

### **Nixon Stands With South Carolina**

*This is what I have called my “Haynsworth Test”. I pass it along to my colleagues for what use they choose to make of it in the future. I have tried to exercise my individual judgment in advising and consenting to presidential nominees to the Supreme Court in a responsible manner. These guidelines, I now leave behind. A fitting epilogue, I hope, to an unforgettable era in the history of the Supreme Court.<sup>1</sup>*

Marlow Cook, 15<sup>th</sup> May 1970

In one of the more overlooked speeches in the history of the US Senate, Republican Senator Marlow Cook of Kentucky spoke for many Southerners when he claimed that Senators had effectively created a ‘new standard’ of qualification when considering President Richard Nixon’s nomination of Judge Clement F. Haynsworth for a vacancy on the Supreme Court. With his conservative legal record drawing criticism and opposition from African American groups and organised labour, Haynsworth was certainly one of the more controversial figures nominated to the nation’s highest court. Yet it was the decision of sceptical Senators to focus on accusations of Haynsworth’s ethical impropriety which provoked an angry response from conservatives such as Cook, who claimed that the Southern nominee was guilty of nothing other than being Southern. In reminding his colleagues that no charges of ethical impropriety were ever proved

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<sup>1</sup> Statement by Senator Marlow W. Cook on the floor of the Senate, 15<sup>th</sup> May 1970, p.15, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 126, Judiciary, Judges, Selection and Appointment, Supreme Court, General.

during the deliberations over Haynsworth's nomination, Cook claimed in his 'new standards' speech that Haynsworth's rejection constituted 'a low point in the history of the United States Senate', and slammed his colleagues for their supposed anti-Southern prejudice.<sup>2</sup>

For two Southern Senators in particular— Strom Thurmond and Ernest 'Fritz' Hollings — the Haynsworth nomination held special significance. In addition to selecting a nominee considered by both men to be a capable judge with an impeccable track record of conservatism, President Nixon had also chosen a judge from their home state of South Carolina. The existing literature suggests agreement among scholars that Haynsworth was chosen as a calculated move to 'repay' the South for Nixon's 1968 election victory and also encourage support for the re-election effort of 1972, but the fact that Nixon's first Southern nominee happened to be a South Carolinian only re-enforces the influence of Strom Thurmond in bringing Nixon to the White House.<sup>3</sup> After fifteen long years of resisting the progress of the civil rights movement by opposing judicial nominees considered hostile to the Southern way of life, South Carolina's Senators would finally, in 1969, be granted an opportunity to install one of their own on the Supreme Court.

The Haynsworth affair showcased a dramatic change in the role established by each of the two Senators in the nomination process in the years prior to 1969. As Chapters Four and Five have illustrated, Thurmond was the chief antagonist in the Marshall hearings of 1967 and the Fortas Chief Justice hearings of 1968, and, with his leading role in denying President Lyndon Johnson the opportunity to replace the outgoing Earl Warren, the South Carolinian could claim a small, indirect influence in Nixon's eventual appointment, in the spring of 1969, of 'strict constructionist' Judge Warren Burger as the new Chief Justice of the United States. By contrast, Fritz Hollings had maintained a low profile in the

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<sup>2</sup> Statement by Senator Marlow W. Cook, p. 7.

<sup>3</sup> See, for example, A. Mitchell McConnell, 'Haynsworth and Carswell: A New Senate Standard of Excellence', *Kentucky Law Journal* 59 (1970-71), pp.7-34; Edward N. Beiser, 'The Haynsworth Affair Reconsidered: The Significance of Conflicting Perceptions of the Judicial Role', *Vanderbilt Law Review* 23 (1969-70), pp.263-290, and Joel B. Grossman and Stephen L. Wasby, 'Haynsworth and Parker: History Does Live Again', *South Carolina Law Review* 23 (1971), pp.345-359.

process, choosing the wording of his public statements carefully and ensuring that each position taken would not harm his political future as a Deep South Democrat. With the Haynsworth nomination, Hollings's role would experience a significant development: as with Thurmond during the Fortas hearings, Hollings shifted from a defensive/obstructionist position to a more interventionist role in the process, with the intention of establishing a sound conservative ideology on the Court while also guaranteeing South Carolinian representation on that body for the first time since 1943, when Justice (later Governor) James Byrnes had departed the Court to head President Franklin Roosevelt's Office of Economic Stabilization.<sup>4</sup>

As noted in Chapter One, a large number of previous studies have focused on the failure of controversial nominations from the presidential point of view. Richard Watson's views on Herbert Hoover, Mark Silverstein's comments on Lyndon Johnson, and John Maltese's reflections on Richard Nixon would appear to suggest that if a scholarly consensus does exist regarding the question of responsibility when a Supreme Court nomination fails, it is that the President is usually the one to blame, either because his selection was made poorly or because he was unable to marshal a sufficient army of supporters to ensure confirmation.<sup>5</sup> Rarely, if ever, has a scholarly work examined the failure of a Supreme Court nomination by focusing on the intentions, actions and ideologies of the two Senators from the nominee's home state, and never has a previous study examined such a failure within the context of that state's history in the nomination process.

With Nixon's nomination of Haynsworth unleashing a more outspoken Fritz Hollings – happy to dive head-first into a heated debate over a controversial nominee – Strom Thurmond would begin something of a mellowing process during the first term of the Nixon Presidency. With President Ronald Reagan eventually building on Nixon's Court strategy by nominating a string of

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<sup>4</sup> David Robertson, *Sly and Able: A Political Biography of James F. Byrnes* (New York, NY: W.W. Norton and Co, 1994), p.318-9.

<sup>5</sup> See Richard L. Watson, 'The Defeat of Judge Parker: A Study in Pressure Groups and Politics', *Mississippi Valley Historical Review* 50/2 (1963), pp.213-234; Mark Silverstein, *Judicious Choices: The Politics of Supreme Court Appointments* (London: Norton, 2004) and John Maltese, *The Selling of Supreme Court Nominees* (Baltimore, MD: Johns Hopkins Press, 1995).

conservative strict constructionist judges, with whom the ageing Republican Senator had no quarrel, Thurmond would never again, after 1968, find a reason to unleash his inner rage as a participant in the nominations process. Thanks to his dedicated participation in the conservative movement of the late twentieth century, he had finally succeeded in establishing a nomination process that produced the very brand of Supreme Court Justice he had always longed for. There would be a far less happy outcome for Fritz Hollings's involvement in the Haynsworth nomination: the nominee's rejection, by only five votes, left a sour taste in the junior Senator's mouth, and Hollings would remind his fellow Senators of the injustice inflicted on Haynsworth eighteen years later during the tense debate over the nomination of Robert Bork. He appeared to have mellowed very little when recalling the episode in his memoirs in 2008, concluding that 'the country was denied the services of a first-rate jurist on the Supreme Court. Bare-knuckled politics had triumphed over substance.'<sup>6</sup>

This chapter considers in depth the crucial role of South Carolina's Senators in re-inventing the process of nominating, scrutinising and confirming Justices of the Supreme Court during a turbulent period in US history. Beginning with an assessment of the Supreme Court nomination process in the wake of the Abe Fortas controversy, this chapter chronicles South Carolinian involvement in a proactive, interventionist method of attempting to influence the process, along with an assessment of how Thurmond's role in the Fortas affair unwittingly shifted the limelight to Fritz Hollings. The impact of the Fortas controversy, and the link to South Carolina via Thurmond, highlights the importance of research objective (3) by again suggesting that the Supreme Court nomination process is best studied through a long-term approach. In highlighting research objective (1), the chapter will continue to emphasise the fact that South Carolina, of all the states, has made the most important contribution to the politicisation of the Supreme Court nomination process. As Mark Silverstein and Joseph Crespino have both noted, controversial issues relating to the Supreme Court were vital to the electoral

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<sup>6</sup> Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008), p.149.

success of Thurmond and other Republican Party politicians from the mid-1960s, and this chapter serves as yet another reminder of South Carolina's prominent role in that story. What makes this story somewhat unique is the fact that the primary sponsor of the Haynsworth nomination was not the Republican Thurmond, but his Democratic 'partner' in the Senate, Fritz Hollings.

Following an in-depth examination of the events of May 1969 – perhaps the zenith of South Carolina's involvement in the nominations process – the Haynsworth confirmation hearings are covered in depth, before the chapter considers the impact of the Haynsworth disaster on perceptions of the state of South Carolina during this period. Some further reflections are offered to illustrate the two very different paths of influence pursued by Thurmond and Hollings in future years.

### **The Floodgates**

As the previous chapter has illustrated, President Lyndon Johnson's attempt to elevate Justice Abe Fortas to the Chief Justiceship was wrecked by a Republican Senate filibuster amid accusations of opportunism, cronyism and greed, with Senators Strom Thurmond and Bob Griffin bringing the Johnson Presidency to a tragic and bitter end by denying Johnson the opportunity to name a replacement for Chief Justice Earl Warren. The success of the Thurmond/Griffin attack was emphasised by the fact that the Fortas affair provoked an outbreak of debate amongst scholars and politicians over the role of the Senate in the confirmation of Supreme Court Justices.<sup>7</sup> Among the early examples of the debate is a pair of

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<sup>7</sup> In addition to the Griffin and Hart articles discussed in this section of the chapter, examples include Luis Kutner, 'Advice and Dissent: Due Process of the Senate', *DePaul Law Review* 23 (1973-4), pp.658-690; John D. Felice and Herbert F. Weisberg, 'The Changing Importance of Ideology, Party, and Region in Confirmation of Supreme Court Nominees, 1953-1988', *Kentucky Law Journal* 77 (1988-9), pp.509-530; James E. Gauch, 'The Intended Role of the Senate in Supreme Court Appointments', *The University of Chicago Law Review* 65:1 (1989), pp.337-365; Albert P. Melone, 'The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality', *Judicature* 75 :2 (1991-2), pp.68-79; William Bradford Reynolds, 'The Confirmation Process: Too Much Advice and Too Little Consent', *Judicature* 75:2 (1991-2), pp.80-2; Mark Silverstein, 'The People, The Senate and the Court: The Democratisation of the Judicial Confirmation System', *Constitutional Commentary* 9 (1992), pp.41-58; P.S. Ruckman Jr, 'The Supreme Court, Critical

articles published in *Prospectus* in the aftermath of the Fortas debacle, in which the two Senators from Michigan – the aforementioned Griffin, Republican, and Philip Hart, Democratic Senator and member of the Senate Judiciary Committee – put forward two opposing arguments over the Senate’s role in the nominations process. Griffin, in his article, ‘The Broad Role’, outlined his opposition to the Fortas nomination by opening with Alexis de Tocqueville’s comment that ‘if the Supreme Court is ever composed of imprudent men or bad citizens, the union may be plunged into anarchy or civil war’, before arguing that only a ‘broader and more purposive interpretation’ of the Senate’s power to ‘advise and consent’ on judicial nominations to the Supreme Court will ensure the ‘quality’ of the nine Justices.<sup>8</sup> The imitable Hart, who had continued to support Abe Fortas’s confirmation as Lyndon Johnson’s Democratic coalition in the Senate was falling apart, argued in his article, ‘The Discriminating Role’, that the ‘broader’ role of the Senate had never prevented the confirmation of ‘mediocrities whose names are better left unremembered.’<sup>9</sup> While Griffin believed that the Senate’s power of advice and consent, as covered by Article II, Section 2 of the US Constitution, ‘is not only real but is at least as important as the power of the President to nominate,’ Hart declared, with characteristic understatement, ‘I appear to be advocating that the Senate continue to muddle along as it has done in the past: approving most appointments, but occasionally being cantankerous.’<sup>10</sup> The friendly debate between the two Michiganders illustrates clearly the polarising effect of the Fortas rejection on the Senate’s role in the nomination process, with Senators adopting markedly different perspectives on their personal and professional responsibilities in consenting to, or denying, a presidential selection of a Supreme Court Justice.

The significance of South Carolina during this pivotal era in the history of Supreme Court nominations was once again evident during the remarkable month

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Nominations, and the Senate Confirmation Process’, *The Journal of Politics* 55:3 (1993), pp.793-805; and, crucially, the aforementioned McConnell, ‘Haynsworth and Carswell’, which is discussed later in the chapter.

<sup>8</sup> Robert P. Griffin, ‘The Broad Role’, 2 *Prospectus* (1968-69), pp.285-303; p.285; p.291.

<sup>9</sup> Philip A. Hart, ‘The Discriminating Role’, 2 *Prospectus* (1968-69), pp.305-310; p.308.

<sup>10</sup> Griffin, ‘The Broad Role’, p.287; Hart, ‘The Discriminating Role’, p.307.



of May 1969, during which four highly important developments occurred. The first, and arguably most dramatic, was the resignation of a sitting Justice of the Supreme Court. Thurmond had declared to the Senate the previous October his recommendation that Justice Abe Fortas resign from the Court ‘for the sake of good government’ following the failure of his nomination to become Chief Justice. Seven months after facing down Dixie in his now-legendary confirmation hearings, Abe Fortas did indeed submit his resignation from the Court, on 14<sup>th</sup> May 1969, following the revelation that he had been accepting a \$20,000 retainer from Wall Street financier Louis Wolfson.<sup>11</sup> The allegation, published in *Life* magazine on 4<sup>th</sup> May following an investigation aided by the Justice Department under the leadership of Nixon’s Attorney General, John Mitchell, caused a storm in Washington, DC. Lengthy impeachment proceedings were avoided when Chief Justice Warren persuaded Fortas to resign, marking yet another victory for Thurmond and the Nixon Administration.<sup>12</sup>

The second event provided another example of Thurmond’s growing confidence. Having experienced success in preventing an undesirable liberal nominee from reaching the Chief Justiceship, Thurmond attempted, in May 1969, to use his influence to remove a serving Justice by calling for the impeachment of William O. Douglas – long associated with the Court’s liberal bloc – by criticising Douglas’s role as Chairman of the ‘overtly political’ Center for the Study of Democratic Institutions, and his role as director of the Parvin Foundation, established by multi-millionaire Albert Parvin supposedly as ‘a front for gambling enterprises and persons of anti-democratic character.’<sup>13</sup> In a clear indication that he was using Fortas’s resignation as an opportunity to push for the removal of another liberal Justice in order to award Nixon another vacancy, *The New York Times* reported that ‘Mr Thurmond charged that the case of Abe Fortas, who recently resigned as an Associate Justice, and the controversy over Justice

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<sup>11</sup> Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (Macon, GA: Mercer University Press, 1995), p.403. See also Bruce Allen Murphy, *Fortas* (New York, NY: William Morrow and Co, Inc, 1988), p.195-200.

<sup>12</sup> Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon and Schuster, 1979), p.14-17.

<sup>13</sup> Laura Kalman, *Abe Fortas: a Biography* (New Haven, CT: Yale University Press, 1992), p.374.

Douglas's connection with the Parvin Foundation "are intertwined."<sup>14</sup> On the very same day that he made this claim, Thurmond explained in a letter to Claude Ragsdale Jr that 'Fortas should never have been appointed by Lyndon Johnson to be Associate Justice and I am glad that we stopped him becoming Chief Justice in that he is now off the Court altogether. Douglas should also get off.'<sup>15</sup> Never one to drift unexpectedly into modesty or self-doubt, Thurmond claimed in another letter that 'I am more convinced than ever that my position was correct in strongly opposing [Fortas] and helping to defeat him.'<sup>16</sup> Smelling blood, some conservatives also targeted Justice William Brennan, another well-established liberal force on the Court, for a real estate investment he had made with Fortas and some lower court judges. Brennan responded by giving up all activities outside his duties on the Supreme Court, including not only the real estate investment but also his future speaking plans, and a part-time teaching post at New York University.<sup>17</sup>

With the third notable event to take place during May 1969, Thurmond reaped the benefits of his hard work in preventing the confirmation of Abe Fortas. President Nixon's appointment of Judge Warren Burger as the new Chief Justice of the United States received acclaim from Southern members of the Senate Judiciary Committee, with John McClellan of Arkansas claiming that Burger's record on the US Court of Appeals for the District of Columbia Circuit 'commends itself to the endorsement of the American people and American jurisprudence', and Sam Ervin of North Carolina arguing that the appointment 'affords us the guarantee that we will have to return to constitutional government in the United States as far as the Supreme Court is concerned.'<sup>18</sup> Adding his voice to the chorus of praise, which culminated in a unanimous vote of approval by the Committee, a

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<sup>14</sup> 'Thurmond Urges Douglas To Quit', *The New York Times*, 30 May 1969, p.11.

<sup>15</sup> Letter from Strom Thurmond to Claude Ragsdale Jr, 28<sup>th</sup> May 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1969, Box 28, Folder 1.

<sup>16</sup> Letter from Strom Thurmond to Thomas J. Robertson, 9<sup>th</sup> May 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1969, Box 28, Folder 1.

<sup>17</sup> Woodward and Armstrong, *The Brethren*, p.17-8.

<sup>18</sup> 'Burger Nomination is Lauded by Conservative Members of Senate Judiciary Panel', *The New York Times*, 22<sup>nd</sup> May 1969, p.37.

delighted Thurmond told a constituent that ‘the President has made an excellent choice in Judge Burger as Chief Justice. Hopefully, with him in this vital position, we will see a marked improvement in the direction of the Court.’<sup>19</sup> Aside from being the first occasion on which he seemed genuinely satisfied with a presidential nomination of a Supreme Court Justice since his arrival in the Senate in 1955, the Burger appointment marked the culmination of Thurmond’s determination to infiltrate the process of selection in a bid to influence the future direction of the Court. The role of South Carolina’s senior Senator in the process of Supreme Court nominations, as he had come to see it, was no longer a simple matter of preventing the confirmation of nominees with dangerous liberal ideologies: by 1968, his influence in the process had advanced markedly through his invaluable contribution to Richard Nixon’s ‘Southern Strategy’ and his prominent role in galvanising conservative forces during a period of civil unrest. With Earl Warren gone and Warren Burger in place, the impact of Strom Thurmond and the South Carolinian Republican movement in influencing the line-up of the US Supreme Court was undeniable.

The fourth and final reason for the significance of May 1969 was the manner in which South Carolina’s junior Senator, Fritz Hollings, rather than Thurmond, influenced Nixon’s selection of a South Carolinian judge for the Supreme Court. With Fortas’s departure requiring Nixon to fill another vacancy, Hollings saw an opportunity to mention the name of Clement Furman Haynsworth, of the US Court of Appeals for the Fourth Circuit, during a meeting with the President at the White House on 28<sup>th</sup> May.<sup>20</sup> Given the junior Senator’s low-key involvement in the nominations process prior to May 1969, it might have seemed more logical that Thurmond, with his rapidly inflating confidence, would have influenced Nixon’s selection of a South Carolinian nominee, particularly as he had pursued with such vigour the rejection of Fortas, the impeachment of

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<sup>19</sup> Letter from Strom Thurmond to Rex L. Blanton, 26<sup>th</sup> May 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1969, Box 28, Folder 1.

<sup>20</sup> John P. Frank, *Clement Haynsworth, the Senate and the Supreme Court* (Charlottesville, VA, and London: University Press of Virginia, 1991), p.23; Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008), p.143.

Douglas, and the appointment of a 'strict constructionist' in the form of Burger. Yet, the Nixon Administration welcomed Fritz Hollings's recommendation and promotion of Judge Haynsworth: with a South Carolinian Supreme Court nominee linked to the charismatic Hollings rather than the abrasive Thurmond, the Administration hoped to avoid resurrecting Drew Pearson's accusations of the political 'deal' which allegedly took place between Nixon and Thurmond during the previous year's Republican National Convention in Miami. As covered in Chapter Five, Pearson claimed that Nixon had guaranteed Thurmond the appointment of Supreme Court Justices 'agreeable to the South' if Thurmond used his influence among Southern delegates to secure Nixon's nomination.<sup>21</sup> Hollings believed that, despite Thurmond's role in Nixon's election victory, his controversial reputation had become problematic for the Republican Party, claiming in his memoirs that 'we had some fine judges in South Carolina, but Thurmond at this point was no help in influencing the decision process. His zealousness over the years had alienated even some fellow Republicans. They worried that he was hurting the image of the GOP.'<sup>22</sup>

Nonetheless, Thurmond was not shy in sharing with Nixon his own preference for a South Carolinian nominee, namely, former Governor Donald S. Russell, who, as discussed in Chapter Four, had appointed himself to the late Olin D. Johnston's Senate seat prior to his defeat at the hands of Fritz Hollings in the Democratic primary contest of 1966. Thurmond's logic was that the appointment of a conservative Democrat such as Russell would actually prove more useful to the growth of the Republican Party in South Carolina than the appointment of the Republican Clement Haynsworth. As John Spratt, then President of the South Carolina State Bar, recalls:

[Thurmond] knew that the Republican Party, if it was going to succeed in South Carolina, didn't need more country club Republicans and aristocratic types, they needed down-to-earth people, like he was. So he didn't come out for [Haynsworth]. Instead, he came out for Donald Russell. And Donald

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<sup>21</sup> 'Nixon Gave Thurmond Supreme Court Veto', *The Lewiston Daily Sun*, 20 August 1968, p.4.

<sup>22</sup> Hollings and Victor, *Making Government Work*, p.143-4.

Russell was a wonderful guy, smart as he could be ... He was smart, he was very conservative, and everybody in the Senate had the highest regard for him, Democrat and Republican.<sup>23</sup>

The disagreement between Thurmond and Hollings over the best candidate to fill the Fortas vacancy in 1969 suggests that the party dimension was more relevant than ever before in influencing the attitudes of South Carolina's Senators in the nomination of Supreme Court Justices. With each man keeping an eye on the dramatic development of the two-party system in their state, the Republican Thurmond's endorsement of the segregationist Democrat Russell was made in order to build on the Republican presence in South Carolina, while the Democrat Hollings's decision to throw his weight behind the conservative Republican Clement Haynsworth seemed a logical tactic in preventing the defection of white conservative voters from the Democratic Party to the Republicans. Hollings later claimed that the Administration's preference for Haynsworth was due not solely to his Republican Party affiliation, but also because of a belief in the White House that Thurmond's involvement 'would complicate its efforts to promote a judge from South Carolina to the Supreme Court.' As Hollings recalls:

It appeared that they got the message to him to be circumspect, lie low and essentially confine himself in the Senate to written comments other than a few perfunctory remarks. I would handle the nomination ... I reassured my Democratic colleagues of Haynsworth's character and went out of my way to make it clear that he was not Thurmond's man.<sup>24</sup>

The fact that Hollings 'went out of his way' to convince his colleagues that there was no link between Thurmond and Haynsworth suggested that Thurmond's 'achievements' as the antagonist of the Supreme Court nomination process had come at a price for the senior Senator's popularity. By June 1969, it seemed that Thurmond's influence in the process had peaked: he was reportedly 'embarrassed' that his choice of a South Carolinian judge was passed over for the

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<sup>23</sup> Interview with John Spratt, 28<sup>th</sup> September 2014.

<sup>24</sup> Hollings and Victor, *Making Government Work*, p.143-4.

preference of Fritz Hollings, and he would be reduced to a back seat role in the process of Clement Haynsworth's confirmation.<sup>25</sup> He would prove even less successful in his attempted impeachment of Justice Douglas. As Harry Ashmore, former editor of the *Arkansas Gazette*, pointed out, the Senator's 'charges' against Douglas did not seem credible given that Judge Burger had recently presided over a conference held by the Center for the Study of Democratic Institutions – the very same 'overtly political' institution to which Douglas belonged – and had also had his air fare and hotel expenses covered.<sup>26</sup> Few others took the accusations against Douglas seriously. Senator Edward M. Kennedy of Massachusetts argued in the Senate that Thurmond could not cite 'one example here on the floor, where he can be challenged, during all the thirty years Justice Douglas has been on the Supreme Court, where he has had to disqualify himself from a case that came up because of prior kinds of activities.'<sup>27</sup> In addition to previewing the contentious issue at the heart of the Clement Haynsworth nomination, the controversy over Justice Douglas's supposed ethical impropriety prompted him to resign from the Parvin Foundation on 21<sup>st</sup> May, but the attempted impeachment only encouraged the ageing Roosevelt appointee to remain on the Supreme Court for another six years, by which time he was wheelchair-bound and on the verge of senility.<sup>28</sup>

Thurmond would remain on the side-lines while Hollings led the campaign for Haynsworth's confirmation, but Nixon's hope of a Southern Supreme Court nomination free from controversy would prove short-lived. Hollings, like his predecessors, Thurmond and Johnston, would now become the face of South Carolinian controversy in the nomination process for Supreme Court Justices.

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<sup>25</sup> 'Dirksen Says Haynsworth Will Get Court Post', *The New York Times*, 14 August 1969, p.17.

<sup>26</sup> 'Thurmond Urges Douglas To Quit', *The New York Times*, 30 May 1969, p.11.

<sup>27</sup> 'Kennedy, Thurmond Squabble On Justice Douglas, Education', *The Milwaukee Journal*, 10 June 1969, p.4.

<sup>28</sup> Woodward and Armstrong, *The Brethren*, p.476-80.

## **The Gathering Storm**

In the words of John P. Frank, ‘there can’t be an older “Old South” than Judge Haynsworth.’<sup>29</sup> Born in Greenville, South Carolina, in 1912, Clement Haynsworth was the fifth generation in a direct succession of Haynsworth lawyers. After graduating from Harvard, he joined the family law firm back in Greenville, which developed into one of the major law practices in the South Carolina upcountry. Having overcome a speech impediment to become a highly successful corporate lawyer and ‘business-getter’, Haynsworth remained with the family firm, spending three years serving in World War II, before being nominated to the United States Court of Appeals for the Fourth Circuit by President Dwight D. Eisenhower in 1957, shortly after the Simon Sobeloff controversy, covered in Chapter Two.<sup>30</sup> As the senior Senator from South Carolina, and a member of the Judiciary Committee, Olin Johnston received many endorsements for Haynsworth’s confirmation from prominent South Carolinians, including the President of the South Carolina Bar Association; the Secretaries of the Spartanburg, Anderson and Greenwood County Bar Associations; the Managing Director of the Hotel Greenville; the President of Her Majesty Underwear, and the Chairman of the Daniel Construction Company, Charles E. Daniel.<sup>31</sup>

With his appointment under consideration by a three-man sub-committee chaired by Johnston from 7<sup>th</sup> March 1957, Haynsworth corresponded with the Chairman for several days, assuring Johnston on 11<sup>th</sup> March that ‘I shall be only too happy to inform you of any detail of my personal and public life which may be of interest to you.’<sup>32</sup> Following his confirmation, Haynsworth wrote again to Johnston on 8<sup>th</sup> April to show appreciation ‘for your kindness in calling me on the telephone on Thursday to report the action of the Senate in confirming my

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<sup>29</sup> Frank, *Clement Haynsworth*, p.17.

<sup>30</sup> *Ibid.*, p.17-8.

<sup>31</sup> Nomination of Clement F. Haynsworth, Jr [list of submissions of endorsements], 20<sup>th</sup> February 1957, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 60, Folder 101; letter from Charles E. Daniel to Olin D. Johnston, 8<sup>th</sup> March 1957; letter from Wake H. Myers to Olin D. Johnston, 25<sup>th</sup> February 1957; letter from Arthur Magill to Olin D. Johnston, 25<sup>th</sup> February 1957, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 60, Folder 103.

<sup>32</sup> Letter from Clement Haynsworth to Olin D. Johnston, 11<sup>th</sup> March 1957, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 60, Judiciary Committee, Appointments, Haynsworth, Clement F., Folder 101.

appointment to the Court of Appeals.<sup>33</sup> When Mississippi's James Eastland, Chairman of the full Committee, contacted South Carolina's then-junior Senator, Strom Thurmond, with a request that he return his 'blue slip' – the device by which Senators indicate to the Chairman their approval or disapproval of a nominee – Thurmond responded, 'Mr Haynesworth [*sic*] was not my choice for the position but I intend to vote for his confirmation.'<sup>34</sup> Shortly after, Eastland received a letter from Bernard Segal, of the American Bar Association's Standing Committee on the Federal Judiciary, advising the Chairman that 'we consider Mr Haynsworth qualified for this appointment, and this is the present unanimous view of the Committee.'<sup>35</sup> As the new judge on the Fourth Circuit Court of Appeals, Haynsworth sat alongside John J. Parker, whose nomination to the US Supreme Court had been rejected in 1930.<sup>36</sup> Given that Abe Fortas's nomination to become Chief Justice was withdrawn by Lyndon Johnson at Fortas's request, it remained the case that no nomination for the Supreme Court since Parker's had been rejected by the US Senate.<sup>37</sup>

According to Hollings, when he reminded President Nixon that he had met Clement Haynsworth at an investment meeting in Haynsworth's home town of Greenville, the President recalled, 'Oh, that little fella that stuttered.'<sup>38</sup> After Nixon requested that Hollings outline Haynsworth's qualifications by letter, Hollings complied the very same day, enclosing a biographical sketch and informing the President that 'Judge Haynsworth has inspired us all to greater service. His decisions reflect a thorough understanding of legal principles, and his outstanding analyses of complex legal questions would instil stability in the

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<sup>33</sup> Letter from Clement Haynsworth to Olin D. Johnston, 8<sup>th</sup> April 1957, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 60, Judiciary Committee, Appointments, Haynsworth, Clement F., Folder 101.

<sup>34</sup> 'Blue slip' communication between James O. Eastland and Strom Thurmond, 21<sup>st</sup> February 1957, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, Hearings and Committee Report: Hearings, 1957.

<sup>35</sup> Letter from Bernard G. Segal to James O. Eastland, 1<sup>st</sup> March 1957, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, Hearings and Committee Report: Hearings, 1957.

<sup>36</sup> Laurence H. Tribe, *God Save This Honorable Court* (New York, NY: Random House, 1985), p.90-1.

<sup>37</sup> Silverstein, 'The People, The Senate', p.42.

<sup>38</sup> Interview with Ernest 'Fritz' Hollings by Andrea L'Hommedieu, 20<sup>th</sup> June 2012, George J. Mitchell Oral History Project, Bowdoin Digital Commons [<http://digitalcommons.bowdoin.edu/mitchelloralhistory/200/>].



nation's highest Court.'<sup>39</sup> Nixon was won over by Hollings's assurance of Haynsworth's conservative ideology, the nature of which would later lead to an amusing exchange during the confirmation hearings. When the phrase 'strict constructionist' came up during questioning, the aforementioned Senator Philip Hart of Michigan commented that although he was uncertain as to what a 'strict constructionist' was, he assumed Haynsworth to be one. The nominee remarked, 'I have been said to be one. I don't know – I don't know what it is and I certainly do not know that I am one ... The term has not been defined to me by anyone, sir.'<sup>40</sup> Two days on from Hollings's letter to Nixon, the Senator received a note from Haynsworth, thanking him for the endorsement. While acknowledging that 'Supreme Court appointments are so rare, the available choice so broad, and the uncertainties of political affairs so great that anyone would be foolish to acknowledge the slightest expectation,' Haynsworth was barely able to contain his excitement, adding that 'if the President is looking for experienced judges, however, I am in the rather enviable position of having as much as twelve years' experience as an appellate judge, while so far avoiding attaining a state of very advanced years.'<sup>41</sup>

By 21<sup>st</sup> August 1969, when Richard Nixon formally nominated Haynsworth to replace Abe Fortas on the Supreme Court, the line-up of the Senate Judiciary Committee gave Hollings a good reason to feel confident that the nominee would ultimately be confirmed by the US Senate.<sup>42</sup> In 1969, the Fourth Circuit – comprising the states of Maryland, Virginia, West Virginia, North Carolina and South Carolina – had four Senators as members of the Judiciary Committee: Millard Tydings of Maryland, Robert C. Byrd of West Virginia, Sam Ervin of North Carolina, and Strom Thurmond of South Carolina. John Frank has argued that

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<sup>39</sup> Letter from Ernest 'Fritz' Hollings to President Richard Nixon, 28<sup>th</sup> May 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Pro, Folder 4.

<sup>40</sup> L.A. Scott Powe, 'The Senate and the Court: Questioning a Nominee', *Texas Law Review* 54 (1975-6), pp.891-902; p.894.

<sup>41</sup> Letter from Clement Haynsworth to Ernest 'Fritz' Hollings, 30<sup>th</sup> May 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Pro, Folder 2.

<sup>42</sup> Timothy R. Johnson and Jason M. Roberts, 'Presidential Capital and the Supreme Court Nomination Process', *The Journal of Politics* 66/3 (2004), pp.663-683; p.664n.

‘because of an almost family quality of the bar of the Fourth Circuit, these Senators had a special feeling of knowing their judges, and Senator Tydings, early to question Haynsworth, was very much of that family.’<sup>43</sup>

Before long, however, Hollings became aware of the lukewarm feeling toward the nominee elsewhere in the Senate, particularly as several prominent Democrats appeared to know so little about him. The remarks of Democratic Senate Majority Leader Mike Mansfield of Montana (‘I don’t know anything about the fellow’) and also Philip Hart (‘I don’t know a thing about him’) encouraged Hollings to argue that while Haynsworth favoured a ‘strict constructionist’ interpretation of the Constitution, he was also a ‘moderate’ who ‘had followed what the Supreme Court says the law is.’ By linking Haynsworth to two positions which some would have believed to be mutually exclusive, Hollings’s opening gambit proved ineffective, with *The New York Times* reporting liberal concerns regarding the nominee’s sympathy with the segregationist cause, but also conservative complaints that Haynsworth was not sufficiently conservative.<sup>44</sup>

Significantly, one of the first Senators to oppose Haynsworth openly was Republican Jacob Javits of New York, who had shown more enthusiasm than most in resisting the actions of South Carolinian Senators in the recent past. As outlined in Chapters Two and Three, it was Javits who had stood up to Strom Thurmond and Olin Johnston when the pair tried to curb the power of the Supreme Court in the 1950s, and was also one of the more outspoken figures during Johnston’s determination to block the nomination of Thurgood Marshall to the Second Circuit Court of Appeals in 1962. In a letter to President Nixon, sent before the Haynsworth nomination was announced, Javits cited a series of civil rights cases which, given Haynsworth’s position in each, illustrated to the Senator ‘an approach to the problem of racial segregation which, if injected into the Supreme Court at this time ... could only be viewed as a staggering blow to the cause of civil rights.’<sup>45</sup> Of particular concern to Senators was Haynsworth’s decision to uphold

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<sup>43</sup> Frank, *Clement Haynsworth*, p.37.

<sup>44</sup> ‘Dirksen Says Haynsworth Will Get Court Post’, *The New York Times*, 14 August, p.17.

<sup>45</sup> *Ibid.*, p.17.

Virginia's 'freedom of choice' statutes relating to segregated schools, in a ruling which was later struck down by the Supreme Court in the *Green v. County School Board of New Kent County* decision in 1968.<sup>46</sup> One week later, Hollings received a further indication that Haynsworth's record on civil rights would prove a tough sell to Northern Senators: Roy Wilkins, Executive Director of the National Association for the Advancement of Colored People (NAACP), wrote to the Senator on 22<sup>nd</sup> August to argue that Haynsworth's sympathy with 'the system of racially segregated public education that was upset by the *Brown* case ruling of May 17, 1954' was illustrated by the fact that his decisions on civil rights cases had been reversed by the Supreme Court on four occasions, and his views 'repudiated' by the Justices on one other occasion. Echoing Javits's concerns, Wilkins claimed that Haynsworth's 'elevation to the Supreme Court will retard the progress toward improved racial conditions in the nation', and urged Hollings to vote against confirmation.<sup>47</sup>

Before long, George Meany, head of the American Federation of Labor and Congress of Industrial Organisations (AFL-CIO), was expressing his own opposition to Haynsworth on the basis of the nominee's supposed hostility to organised labour. While Hollings may have been correct that the AFL-CIO – then engaged in a struggle against membership losses as companies were outsourcing their jobs to the South – had sent investigators to South Carolina to 'dig up dirt' on the nominee, he later conceded that the union's opposition to Haynsworth was a 'wake-up call' which shook his initial confidence in the success of the nomination.<sup>48</sup> Just in case Hollings was not sufficiently alarmed by the negative reaction to the nominee's civil rights record and the active opposition of the largest union federation in the United States, a third hammer blow landed on 7<sup>th</sup>

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<sup>46</sup> John Massaro, *Supremely Political* (Albany, NY: State of New York University Press, 1990), p.3; Charles S. Bullock and Janna Deitz, 'Transforming the South: The Role of the Federal Government', in Craig S. Pascoe et al, *The American South During the Twentieth Century* (Athens, GA: University of Georgia Press, 2005), pp.247-262, p.251; J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (Oxford: Oxford University Press, 1979), p.117.

<sup>47</sup> Letter from Roy Wilkins to Ernest 'Fritz' Hollings, 22<sup>nd</sup> August 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 2.

<sup>48</sup> Hollings and Victor, *Making Government Work*, p.145.

September, when Republican Senate leader Everett Dirksen of Illinois died suddenly of a heart attack, delaying the hearings for a week.<sup>49</sup> Having lost the man whom Hollings genuinely believed would guarantee the success of the nomination, the South Carolinian was dismayed when Dirksen was replaced as Minority Leader by Senator Hugh Scott of Pennsylvania.<sup>50</sup> As Hollings later recalled, 'Hugh Scott, he just said Philadelphia and labor just don't like Thurmond ... He wouldn't handle it.'<sup>51</sup> Furthermore, the AFL-CIO position meant that Hollings could not rely on the support of the new Senate Minority Whip, Bob Griffin of Michigan, who would be seeking re-election in 1972 in a heavily-unionised state.<sup>52</sup>

Despite the huge setbacks, Hollings seemed enthusiastic about taking on the considerable challenge of convincing Senators to throw their support behind the controversial South Carolinian nominee. Working closely with Attorney General John Mitchell and also William Rehnquist, Assistant Attorney General for the Office of Legal Counsel, Hollings and Haynsworth pursued a charm offensive with wavering Senators.<sup>53</sup> According to John Spratt, 'every day, Clement Haynsworth would show up at Fritz's office and Fritz would give him his marching orders, and say "I've called so-and-so, I've done this, I've done that, you go see them, they expect you."' <sup>54</sup> At a press conference, Hollings began laying the groundwork for a defence of Haynsworth's civil rights record by arguing that the nominee had ruled that the North Carolina Dental Association could not exclude black dentists from their membership.<sup>55</sup> In introducing the nominee to the Senate Judiciary Committee on 16<sup>th</sup> September, Hollings began by acknowledging the growing opposition to Haynsworth by declaring, 'I find that in presenting him, I must defend him. I do so with pride, because I first suggested him to President

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<sup>49</sup> Frank, *Clement Haynsworth*, p.31.

<sup>50</sup> *Ibid.*, p.26.

<sup>51</sup> Andrea L'Hommedieu Interview with Ernest 'Fritz' Hollings, 20<sup>th</sup> June 2012, George J. Mitchell Oral History Project, Bowdoin Digital Commons.

<sup>52</sup> 'Griffin's Stand Against Haynsworth Sideswipes Kelley's Senate Dream', *Detroit Free Press*, 11<sup>th</sup> October 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1969, Box 28, Folder 4; Hollings and Victor, *Making Government Work*, p.145-6.

<sup>53</sup> Hollings and Victor, *Making Government Work*, p.144.

<sup>54</sup> Interview with John Spratt, 28<sup>th</sup> September 2014.

<sup>55</sup> 'Liberal Democrats Reserve Comments on Nomination', *Sarasota Herald Tribune*, 14 August 1969, p.7.

Nixon last May.<sup>56</sup> The Senator later admitted that 'I felt as though I was presenting an indicted defendant rather than the Chief Judge of the US Court of Appeals for the Fourth Circuit.'<sup>57</sup>

Following Hollings's introduction, Chairman James Eastland kicked off the questioning by referring to the concerns of some on the Judiciary Committee that Haynsworth should have recused himself from the case of *Darlington Manufacturing Company v. NLRB*, which had involved a company with business connections to a vending machine firm by the name of Carolina Vend-A-Matic, in which Haynsworth owned one-seventh of the stock.<sup>58</sup> The doubts over his ethical impropriety were further suggested by the case of *Brunswick Corp. v. Long*, which became a talking point following revelations that Haynsworth had purchased one thousand shares in the Brunswick firm, supposedly while he and the other judges of the Fourth Circuit were considering the case.<sup>59</sup> While no charges of ethical impropriety were ever proved, the persistence of some Senators in discussing the two cases inevitably planted seeds of doubt, allowing prominent Haynsworth opponents such as George Meany to claim that the nominee lacked 'the legal ethics of straightforward honesty.'<sup>60</sup>

With the 'Fourth Circuit' Senators, Tydings and Ervin, giving the nominee every opportunity to make his case, and Eastland concluding that 'I will not make a final determination on the confirmation of the nominee before us based on the criticism that has been levelled at him', the first day of hearings concluded with little discussion of how Haynsworth's confirmation would affect the jurisprudence of the Supreme Court.<sup>61</sup> This changed on the following day, 17<sup>th</sup> September, when

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<sup>56</sup> Statement by Senator Ernest F. Hollings in introduction of Judge Clement Haynsworth before Judiciary Committee, 16<sup>th</sup> September 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, box 128.

<sup>57</sup> Hollings and Victor, *Making Government Work*, p.145.

<sup>58</sup> Hearings Before Committee on the Judiciary, United States Senate, Ninety-First Congress, First Session on Nomination of Clement F. Haynsworth Jr, of South Carolina, to be Associate Justice of the Supreme Court of the United States, 16<sup>th</sup> September 1969, p.39; Statement by Senator Marlow W. Cook on the floor of the Senate, 15<sup>th</sup> May 1970, p.15, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, box 126.

<sup>59</sup> Statement by Senator Marlow W. Cook on the floor of the Senate, 15<sup>th</sup> May 1970, p.15, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 126, Judiciary, Judges, Selection and Appointment, Supreme Court, General.

<sup>60</sup> Frank, *Clement Haynsworth*, p.32.

<sup>61</sup> Hearings, 16<sup>th</sup> September 1969, p.58.

Philip Hart's questioning of the nominee on his judicial philosophy was interrupted by Sam Ervin in one of the few highlights of the hearings:

**Senator Ervin:** If the Senator will pardon me for committing an unpardonable sin, I am glad at long last the Senator from Michigan agrees with me that a Senator has a right to ascertain the view of a nominee for the Supreme Court.

**Senator Hart:** I am ascertaining whether he agrees with Earl Warren.

**Senator Ervin:** And I would like to say that I am glad to have a convert to my philosophy. However, I never did get one of the previous nominees to ever reveal any of his political or constitutional philosophy. And I was told at the time that it was highly improper for me to seek to ascertain it. Excuse me. I won't interrupt you anymore.<sup>62</sup>

Ervin's interjection no doubt amused Senators who recalled his and Hart's differing views on previous nominees, but his remarks may also have highlighted the fact that the Southern members of the Judiciary Committee were apparently, for the first time, on the defensive. Shortly after a further round of questions from Senator Edward Kennedy of Massachusetts, it was the turn of Senator Birch Bayh of Indiana, who subjected the nominee to a grueling interrogation, returning to the theme of judicial ethics with regard to Haynsworth's interest in Carolina Vend-A-Matic.<sup>63</sup> When Attorney John P. Frank appeared before the Committee to clarify the issue of whether or not Judge Haynsworth had behaved unethically, Senator Bayh pursued the Carolina Vend-A-Matic issue further:

**Senator Bayh:** Let me ask you why in the well-documented information you have given us, there was little or no reference to the canons of judicial ethics? Why were the canons not significant enough to be considered in your brief?

**Mr Frank:** Because I did not deal with the canons. Because I think for purposes of the federal courts they are simply immaterial. They merely are reflective of, in this highly general language of, what is in the code anyway, and the rule for the federal judges is adequately, I think, covered by the statutes and the cases and I don't think the canons really add anything other than a confirming note or echo.<sup>64</sup>

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<sup>62</sup> Hearings, 17<sup>th</sup> September 1969, p.75.

<sup>63</sup> *Ibid.*, p.80-100.

<sup>64</sup> *Ibid.*, p.129.

Unconvinced by Frank's rather awkward form of diplomacy, Bayh was determined to oppose the confirmation of Clement Haynsworth with the same energy and dedication displayed by Strom Thurmond in his fight against Abe Fortas. Following George Meany's statement on the AFL-CIO's opposition to Haynsworth on 18<sup>th</sup> September, Bayh resumed his questioning of the nominee on 23<sup>rd</sup> September, going into depth in a lengthy interrogation, with Sam Ervin failing to ease the tension by quoting a line from Henry Wadsworth Longfellow's *A Psalm of Life*: 'Time is fleeting, and our hearts, though stout and brave, still, like muffled drums, are beating funeral marches to the grave.'<sup>65</sup>

**Senator Bayh:** What is that supposed to mean?

**Senator Ervin:** It means that apparently we are going to be in the funeral march to the grave before we get through this proceeding.

**Senator Bayh:** I hope not. I am concerned and I suppose I should ask the question if you had to do it over again whether you would still maintain that kind of relationship with Carolina Vend-A-Matic. You feel that there is absolutely nothing that was improper here?

**Judge Haynsworth:** I don't know what you mean by that kind of relationship. I was a stockholder, as I have said.

**Senator Bayh:** Stockholder, Vice President, and your wife is secretary, and you were on the board of directors and you own \$450,000 worth of stock. You are doing business with one of the litigants.

**Judge Haynsworth:** Well now, Senator –

**Senator Bayh:** A significant amount of business of the corporation was done with textile companies, and the case involved was a textile case. This is what concerns me. It is a matter of appearance.

**Judge Haynsworth:** Senator, I was a director until 1963. I was an inactive Vice President. We have been into all of this.<sup>66</sup>

One can only imagine how South Carolina's Strom Thurmond felt as he sat in silence listening to Birch Bayh's interrogation. Nonetheless, the senior Senator complied with the Administration's wishes and limited himself to a tiny number of interventions during the hearings, speaking up to ask John Frank, and later Judge Harrison Winter, Haynsworth's colleague on the Fourth Circuit, if either of them

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<sup>65</sup> Hearings, 23<sup>rd</sup> September 1969, p.291.

<sup>66</sup> *Ibid.*, p.292.

believed that Haynsworth had ever behaved unethically.<sup>67</sup> During the testimony of Clarence Mitchell and Joseph Rauh, of the Leadership Conference on Civil Rights, on 25<sup>th</sup> September, Thurmond made one further intervention, declaring that ‘I have no questions of these witnesses, but I want to inquire at what time are we going to recess for lunch and at what time are we going to come back?’<sup>68</sup>

### **Damage Control**

In his 1991 study of the Haynsworth nomination, John Frank claimed that Birch Bayh was selected as the leader of the anti-Haynsworth campaign by a coalition of groups gathering in opposition to the nominee. Having initially approached Philip Hart to lead the campaign, they settled on Bayh after Hart declined the responsibility, on the grounds that he had been one of Abe Fortas’s most enthusiastic backers in the Senate the previous year.<sup>69</sup> Bayh’s rigorous questioning of Haynsworth during the Judiciary Committee hearings – which concluded with seven members voting against the nominee – culminated, on 8<sup>th</sup> October, in the production of his ‘bill of particulars’, which outlined a total of twenty arguments for why Haynsworth should not be confirmed. These ranged from the allegation that Haynsworth had cast the deciding vote in the *Darlington* decision, favouring Carolina Vend-A-Matic (‘Charge 3’), to the fact that the judge had sat on six cases involving customers of Vend-A-Matic (‘Charge 7’), and the accusation that he had used his office to promote the vending business (‘Charge 16’), in addition to a detailed graph showing the sudden and massive increase in gross annual sales for Vend-A-Matic since Haynsworth became a judge on the Fourth Circuit.<sup>70</sup> The full list of charges was sent to Hollings’s office, along with a formal letter of

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<sup>67</sup> Hearings, 17<sup>th</sup> September 1969, p.135-6; Hearings, 23<sup>rd</sup> September, p.256.

<sup>68</sup> Hearings, 25<sup>th</sup> September 1969, p.458.

<sup>69</sup> Frank, *Clement Haynsworth*, p.30.

<sup>70</sup> Senator Birch Bayh’s Bill of Particulars and Senator Ernest F. Hollings’s Detailed Answer, 18<sup>th</sup> November 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 128, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, Statements, Hollings.



explanation from Bayh, who wrote in pen at the bottom, 'Fritz – I haven't relished this matter, but the facts should be out in the open. Birch.'<sup>71</sup>

Horrified by the 'bill of particulars', and convinced that Bayh was simply pursuing payback for the Republican treatment of Fortas the previous year, Hollings called a press conference, during which he conceded that 'an aura has been created that a judge is on the run' but insisted that the charges were 'grossly exaggerated,' and that 'no actual conflict of interest had been proved.'<sup>72</sup> On the Senate floor, Hollings, in a bid to offset charges brought by a fellow Democrat, was now calling on a group of Republican Senators to help him defend the Haynsworth nomination, including Marlow Cook of Kentucky Howard Baker of Tennessee, Roman Hruska of Nebraska, Barry Goldwater of Arizona, and even his South Carolina colleague, Strom Thurmond.<sup>73</sup> In addition to challenging Bayh to a televised debate on the charges being levelled at Haynsworth, Hollings produced his own document, responding in detail to each of the twenty charges in Bayh's bill while also noting the 'calculated' nature of the accusations.<sup>74</sup>

His response ensured that a comprehensive defence of the nominee would go on record as a rebuttal of Bayh's charges, but his attempt to drag Bayh in front of television cameras proved less straightforward. In a letter dated 9<sup>th</sup> October, Hollings formally challenged the Indiana Senator to a televised debate, pointing out that he would be contacting various TV networks to arrange a suitable time.<sup>75</sup> True to his word, Hollings sent a telegram to the President of News at the Columbia Broadcasting Corporation (CBC); the President of the American

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<sup>71</sup> Letter from Birch Bayh to Ernest 'Fritz' Hollings, 8<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 128, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, Statements, Hollings.

<sup>72</sup> 'Senator Defends Haynsworth Acts', *The New York Times*, 8 October 1969, p.32.

<sup>73</sup> 'Haynsworth Backers In Senate Hold Preview Of Floor Debate', *The New York Times*, 14 October 1969, p.40.

<sup>74</sup> Bill of Particulars and Detailed Answer, 18<sup>th</sup> November 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 128, Judiciary, Judicial Conflict of Interest.

<sup>75</sup> Letter from Ernest 'Fritz' Hollings to Birch Bayh, 9<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

Broadcasting Corporation (ABC) News, and the Vice President In Charge of News at the National Broadcasting Corporation (NBC).<sup>76</sup>

In his response, sent on the same day, Birch Bayh suggested that he was in no mood to be provoked, advising Hollings that 'in light of the serious nature of our responsibility to advise and consent to the nomination of a Justice who will sit on the Supreme Court for life and dispense justice for all of our citizens in that capacity ... we should do our best to debate this matter in a deliberate and dispassionate manner on the floor of the Senate.'<sup>77</sup> The following day, an agitated Hollings responded by pointing out that 'it was you who took the debate from senatorial processes to the headlines and TV tube and now there is no alternative because both public opinion and Senate opinion is formulating.'<sup>78</sup> Hollings remained unconvinced that Bayh would even face him in the Senate, let alone in a television studio. As he recalled in his memoirs, 'Bayh refused to stay on the floor. He would make a charge and then leave.'<sup>79</sup> Referring to an offer from *Meet The Press* to stage a televised debate, Hollings claimed in his 10<sup>th</sup> October correspondence with Bayh that he had accepted the invitation 'because I believe that an answer to your charges is the only way that we can protect the reputation of the United States Senate and of the Court.'<sup>80</sup>

The very same day, an unfazed Bayh tried a different tack:

Dear Fritz:

I have just received your telegram relative to our debating the Haynsworth matter on national television. In re-reading it a second and third time, I still feel very much as I did in response to your first inquiry.

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<sup>76</sup> Telegram from Ernest 'Fritz' Hollings to Mr Richard J. Salant, Mr Elmer W. Lower and Mr Reuven Frank, 9<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

<sup>77</sup> Letter from Birch Bayh to Ernest 'Fritz' Hollings, 9<sup>th</sup> October Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

<sup>78</sup> Telegram from Ernest 'Fritz' Hollings to Birch Bayh, 10<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

<sup>79</sup> Hollings and Victor, *Making Government Work*, p.147-8.

<sup>80</sup> Telegram from Ernest 'Fritz' Hollings to Birch Bayh, 10<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

Fritz, so many different sources have been responsible for various statements and allegations throughout this entire distasteful affair that I am returning your wire without disclosing its contents in the hopes that someone other than yourself was the author.

I have too much respect for you and for the service you have performed and will continue to perform for your state in the Senate to let others goad us into this type of personal acrimony.

Best regards,  
Birch Bayh<sup>81</sup>

In his terse response, Hollings began by claiming ownership of the words in his telegram before complaining to Bayh that 'I don't get this pedestal of personal acrimony that you have assumed. You attack Judge Haynsworth in a nine-page "bill of particulars", then when someone wants to defend him and go down the list of charges, you assume the "don't let's get personal" attitude.' He urged Bayh once again to 'please reconsider your position.'<sup>82</sup> In the final communication from Bayh's office – undated, and scrawled in Bayh's own hand rather than typed – the Senator from Indiana informed his South Carolina colleague that 'one thing you should know is that I did not disclose your last letter. In fact, a member of the press walked into my office with a copy of it ... before I had even received it. Where it originated, I don't know!'<sup>83</sup> When Clement Haynsworth wrote to Fritz Hollings the following month to show his appreciation for the Senator's energetic support for his confirmation, he commented that 'you performed superbly, your only failure being your futile attempt to entice Senator Bayh into a debate in which you would have demolished him.'<sup>84</sup>

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<sup>81</sup> Letter from Birch Bayh to Ernest 'Fritz' Hollings, 10<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

<sup>82</sup> Letter from Ernest 'Fritz' Hollings to Birch Bayh, 13<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

<sup>83</sup> Letter from Birch Bayh to Ernest 'Fritz' Hollings, undated, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 3.

<sup>84</sup> Letter from Clement Haynsworth to Ernest 'Fritz' Hollings, 25<sup>th</sup> November 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 1.

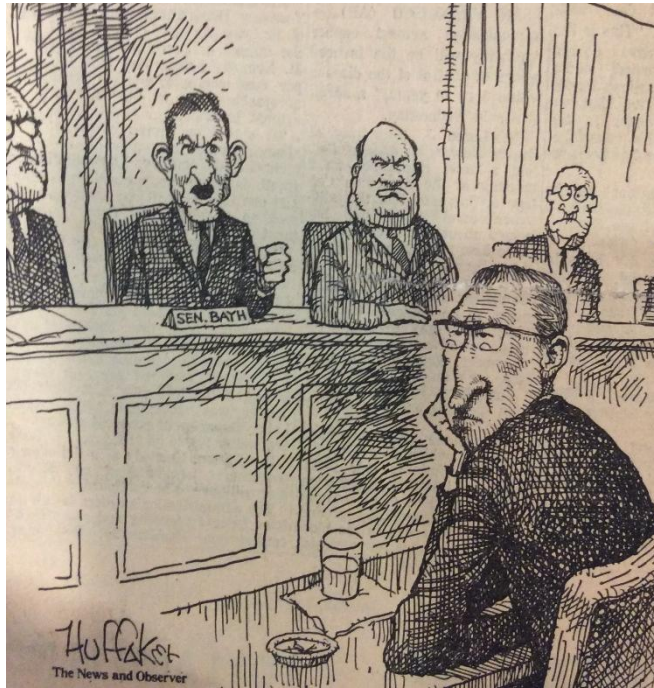


Figure 3. Cartoon from Raleigh (NC) News and Observer, 9<sup>th</sup> October 1969.

An increasingly bullish attitude toward Bayh may have been an indication that the Senator from South Carolina was beginning to sense defeat during the month of October, albeit in the unlikely form of newspaper cartoons. An illustration from the Raleigh (NC) *News and Observer* showing Haynsworth sitting before the members of the Judiciary Committee while an angry-looking Birch Bayh clenched his fist and asked, ‘Judge Haynsworth, it is true that you owned three boxes of Oaties Cereal when you ruled in their case?’ offered a clear example of press ridicule of the perceived triviality of Bayh’s charges but nonetheless highlighted the manner in which the Indianan’s fight against the nominee had infiltrated the public consciousness.<sup>85</sup> Far more serious was an illustration by Herblock in *The Washington Post*, which showed Haynsworth as a schoolboy carrying a book bag with Carolina Vend-A-Matic stock falling out of it, with Attorney General John Mitchell standing beside him, claiming, ‘But your honor,

<sup>85</sup> Cartoon from Raleigh (NC) *News and Observer*, 9<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 2.

my client hasn't done anything wrong – and he promises to stop doing it.'<sup>86</sup>

According to John Spratt, 'Fritz said he knew then it was all over.'<sup>87</sup>

The Nixon Administration faced repeated calls to withdraw the nomination, some from Republican Senators, and one from Haynsworth himself, which was refused by Attorney General Mitchell.<sup>88</sup> As a means of counter-attack, the Administration urged Republican Chairmen in the South to begin arguing that the Haynsworth opposition was motivated solely by the fact that he hailed from the South. Harry Dent, who had served on Thurmond's staff before becoming one of Nixon's crucial Southern political strategists, approached eight Washington, DC correspondents from Southern newspapers to convince them to pursue a 'Southern angle' in their coverage.<sup>89</sup> In Hollings's view, the efforts of the Southern writers who happily played up the supposed anti-Southern bias of the Haynsworth opposition, such as James J. Kilpatrick, failed to dilute the impact of Herblock's 'Vend-A-Justice' cartoons, which he condemned on the Senate floor.<sup>90</sup>

With the ethics question, the civil rights record and the alleged hostility to organised labour, Clement Haynsworth had unwittingly created a smorgasbord of controversy that was guaranteed to unite a diverse coalition of Senators in opposing him. Before long, it became apparent to Hollings and the Nixon Administration that they had underestimated the ability of organised labour and the NAACP to influence the Senate in what Joel Grossman and Stephen Wasby have referred to as a 'desperate effort to save the Court's prevailing liberal policies from destruction.'<sup>91</sup> As each day went by, Hollings experienced a variety of reactions from Senators of both parties: Republican Wallace Bennett of Utah concluded that 'the charges against the judge are political and based on revenge rather than factual, and I have decided to vote for his confirmation', while Democrat Daniel Inouye of Hawaii stated flatly, 'as you know, I have publicly

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<sup>86</sup> Hollings and Victor, *Making Government Work*, p.148-9.

<sup>87</sup> Interview with John Spratt, 28<sup>th</sup> September 2014.

<sup>88</sup> Joel B. Grossman and Stephen L. Wasby, 'Haynsworth and Parker: History Does Live Again', *South Carolina Law Review* 23 (1971), pp.345-359, p.348.

<sup>89</sup> John Maltese, *The Selling of Supreme Court Nominees* (Baltimore, MD: Johns Hopkins University Press, 1998), p.78; Massaro, *Supremely Political*, p.99.

<sup>90</sup> Frank, *Clement Haynsworth*, p.85.

<sup>91</sup> Grossman and Wasby, 'Haynsworth and Parker', p.352.

announced that I intend to vote against Judge Haynsworth's nomination' and Republican Ted Stevens of Alaska declared solemnly that 'I think you should know that I have a persistent doubt developing concerning Judge Haynsworth.'<sup>92</sup> There was a lukewarm feeling even among conservative Republicans, such as Lee Jordan of Idaho, who expressed privately his concern that Haynsworth was in fact Strom Thurmond's 'stalking horse for the Supreme Court'.<sup>93</sup> As Senator Marlow Cook would later point out in his 'new standards' speech, '[Haynsworth's] South Carolina residence was construed as conclusive proof that he was a close friend of the widely-criticised senior Senator from that state' despite the fact that Haynsworth and Thurmond barely knew each other, and despite Hollings's effort to work closely with the Nixon Administration as a means of minimising Thurmond's role in the process of confirmation.<sup>94</sup>

In a desperate bid to defend the nomination, President Nixon called a press conference on 20<sup>th</sup> October, during which he asserted that Haynsworth had never gained personally from any of his rulings. The President claimed that he did not believe that a judge's philosophy constituted an appropriate basis for rejecting a nominee for the Supreme Court, before concluding that 'it is not proper to turn down a man because he is a Southerner, because he is a Jew, because he is a Negro, or because of his philosophy.'<sup>95</sup> This statement, an obvious reference to the troubled nominations of Louis Brandeis in 1916 and Thurgood Marshall in 1967, suggested the extent to which Nixon believed the 'Southern' element to be relevant to those leading the opposition to Clement Haynsworth, but the President's decision to address these issues ultimately failed to save the nomination. Many moderate Republicans, who were already unhappy with the Administration's failure to screen Haynsworth adequately prior to the

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<sup>92</sup> Letter from Wallace F. Bennett to Ernest 'Fritz' Hollings, 10<sup>th</sup> October 1969; letter from Daniel K. Inouye to Ernest 'Fritz' Hollings, 9<sup>th</sup> October 1969; letter from Ted Stevens to Ernest 'Fritz' Hollings, 25<sup>th</sup> October 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Pro, Folder 2.

<sup>93</sup> Massaro, *Supremely Political*, p.21.

<sup>94</sup> Statement by Senator Marlow W. Cook on the floor of the Senate, 15<sup>th</sup> May 1970, p.15, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 126, Judiciary, Judges, Selection and Appointment, Supreme Court, General.

<sup>95</sup> Beiser, 'The Haynsworth Affair', p.270-1.

announcement of his nomination, soon became resentful that they were being pressurised to support a controversial nominee.<sup>96</sup>

Speculation in the press over Haynsworth's prospects was mixed: David Lawrence wrote, in an article published in *The Richmond News Leader*, that an organised effort was being made to block Haynsworth's confirmation 'because he is from the South', while other newspapers, including the *The Charlotte Observer*, predicted a grim outcome, and others, such as *The Washington Post* and South Carolina's *The State*, expected confirmation by a narrow margin.<sup>97</sup> By the final day of the Senate debate, 21<sup>st</sup> November, Hollings had become so despondent that his comments bordered on sarcasm. Referring to himself as 'the undistinguished Senator from South Carolina', he declared that 'with two people on the press gallery, with everybody waiting around for the last two hours to go home, with every Senator for the last two weeks having made up his mind, suffice it to say that we could continue to try to make it look like we are making a record.'<sup>98</sup> The harrowing experience of the Haynsworth affair, which has clearly informed Hollings's opinion on how the Supreme Court nomination process was transformed during the late 1960s, was summed up by the Senator in his memoirs when he asked, 'What good person wants to put himself and his family through the horrific treatment that has become a routine part of the Senate's "advice and consent" process?'<sup>99</sup> One might add that the same question might have been asked following the South Carolinian treatment of Thurgood Marshall and Abe Fortas.

The rejection of Clement Haynsworth's confirmation, by a vote of 45-55, allowed Southern Senators to capitalise on the complaints which many had been making throughout the course of deliberations in the Senate, namely, that the attack on the nominee constituted an attack on the South. A sense of disgust at

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<sup>96</sup> Massaro, *Supremely Political*, p.98-9.

<sup>97</sup> 'Haynsworth Defeat Could Prompt Resentment Vote in Next Election', *The Richmond News Leader*, 12<sup>th</sup> November 1969; 'Ethics Paradox in Haynsworth Case', *The (Washington, DC) Evening Star*, 10<sup>th</sup> November 1969, 'Thin Haynsworth Victory Predicted', *The State*, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Pro, Folder 3; Frank, *Clement Haynsworth*, p.83-4.

<sup>98</sup> Frank, *Clement Haynsworth*, p.87.

<sup>99</sup> Hollings and Victor, *Making Government Work*, p.150.

the supposed anti-Southern bias was evident in the correspondence sent to Strom Thurmond's office, with one writer asking the Senator, 'how many more times will the South get slapped in the face before the people wake up?' and a resident of Ware Shoals complaining that 'all of South Carolina is sick and angry about the treatment given Haynsworth. It was an insult to every South Carolinian, and every Southerner ... This is as bad as "Reconstruction". We need another HAMPTON to save us – and we are looking to you, Senator Thurmond, to be that Hampton.'<sup>100</sup> While Thurmond no doubt appreciated being compared to the civil war hero and former Governor, Wade Hampton, he sounded inconsolable in a letter to Clement Haynsworth, in which he claimed that 'the lamentable failure of the Senate to confirm your nomination was the greatest disappointment I have had since I have been in the Senate.'<sup>101</sup>

In a newsletter, dated 1<sup>st</sup> December 1969, Thurmond compared Haynsworth to the last rejected Supreme Court nominee – Haynsworth's former colleague on the Fourth Circuit, North Carolinian John J. Parker. Certainly there were remarkable similarities between the two men, in that Parker's record on civil rights and his opposition to the 'yellow dog contract' also ensured the resistance of an unlikely coalition of the NAACP and the AFL.<sup>102</sup> However, it was the fact that Parker was from the South that provided the ultimate cause for a comparison, with Thurmond arguing that Haynsworth, like Parker, 'was born and bred to a more exacting tradition of law and history than liberals would accept.'<sup>103</sup> Predictably, Thurmond was not the only one to point to the eerie similarities between Clement Haynsworth and John J. Parker. Shortly before the Haynsworth

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<sup>100</sup> Letter from Carl W. Porter to Strom Thurmond, 21<sup>st</sup> November 1969; Letter from Sara Sullivan Ervin, 24<sup>th</sup> November 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1969, Box 29, Folder 7.

<sup>101</sup> Letter from Strom Thurmond to Clement Haynsworth, 2<sup>nd</sup> December 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1969, Box 29, Folder 7.

<sup>102</sup> Kenneth W. Goings, *The NAACP Comes Of Age: The Defeat Of Judge John J Parker* (Bloomington, IN: University of Indiana Press, 1990), p.25; Richard Kluger, 'The Story of John Johnston Parker: The First Demonstration of Negro Political Power Since Reconstruction', *The Journal of Blacks in Higher Education* 46 (Winter 2004-5), pp.124-5, p.125; Richard L. Watson, 'The Defeat of Judge Parker: A Study in Pressure Groups and Politics', *Mississippi Valley Historical Review* 50/2 (1963), pp.213-234., p.220

<sup>103</sup> Newsletter from the office of Senator Strom Thurmond, 1<sup>st</sup> December 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1970, Box 21, Folder 7.



nomination was defeated in the Senate, James J. Kilpatrick had made the same comparison, speaking of a South 'where defeat is an old companion'.<sup>104</sup>

Nonetheless, the 'anti-South' arguments failed to catch on simply because many remained unconvinced that such a bias existed. Southern Republican Senator Bill Brock recalls, 'I was not aware of any resentment or bitterness towards the South from Senators from other regions during this period ... There certainly was concern about [Republican] gains, but those were the concerns of those whose interests lay in maintaining a majority for Democrats in the Senate.'<sup>105</sup> Ironically, Brock's view that the opposition to Haynsworth was motivated by party concerns rather than regional prejudice provides a further comparison with the Parker rejection: some Senators were resentful of Nixon's attempt to appoint a South Carolinian judge as part of a Republican 'Southern Strategy' in 1969, in the same way that, in 1930, several Southern Democrats were prepared to vote against the North Carolinian Parker in order to prevent Republican President Herbert Hoover from building on his success in winning the state of North Carolina in the 1928 Presidential Election.<sup>106</sup> Furthermore, given that South Carolina was the only Deep South state won by Nixon in 1968, it may have been Haynsworth's association with that particular state, rather than the South as a whole, that alienated wavering Senators.

The efforts of the Administration to minimise Thurmond's role in the Haynsworth nomination had failed to erase memories of the Senator's influence in the election of Richard Nixon, and his leadership of the successful campaign to deny Abe Fortas the Chief Justiceship. Senator Millard Tydings of Maryland summed up the relevance of the Fortas rejection on the fate of Clement Haynsworth when he claimed that:

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<sup>104</sup> 'Thin Haynsworth Victory Predicted', *The State*, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Pro, Folder 3.

<sup>105</sup> Letter from Bill Brock, 22<sup>nd</sup> April 2014.

<sup>106</sup> See, generally, Donald J. Lisio, *Hoover, Blacks and Lily-Whites: A Study of Southern Strategies* (Chapel Hill, NC: University of North Carolina Press, 1985).

The Fortas affair cast over the Court a shadow of suspicion and mistrust from which the Court has not fully emerged. This aura hangs most noticeably over Mr Fortas's vacant seat, the very one to which Judge Haynsworth has been nominated. We must recognise that the ultimate decision in the present matter cannot realistically be insulated from this spectre.<sup>107</sup>

With his successful campaign against Fortas in 1968, the formidable, uncompromising Thurmond may unwittingly have sabotaged a golden opportunity to engineer the appointment of a conservative South Carolinian Supreme Court Justice in 1969.

Fritz Hollings remained outspoken following Haynsworth's rejection. In a letter to W.C. Boyd, the Senator played down his feud with fellow Democrat Birch Bayh and instead complained bitterly that the Republicans were responsible for derailing Haynsworth's nomination:

Daily we had their leader, Scott of Pennsylvania, and the Republican Whip, Griffin of Michigan, shouting for the President to withdraw the appointment. In the month-long debate, our leader, Mike Mansfield, by contrast, never said one word against Haynsworth and only made his decision known the afternoon before the vote. It so happens that the Attorney General of the United States commented to me only last week that the Republicans defeated Clement and all you have to do is ask Clement. I handled the appointment. I know this better than anyone.<sup>108</sup>

To the President of Dan River Mills in Greenville, the Senator claimed that 'Clement was a good product, but we just couldn't sell. You will remember my desperation in August and September. I could see the gathering storm and then Senator Dirksen died and we had to move fast. The Administration sat back as if they knew how to handle the situation and we never got back in the ball game.'<sup>109</sup> When Hollings went public with his criticism, he received a stinging rebuke from J.

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<sup>107</sup> Massaro, *Supremely Political*, p.81.

<sup>108</sup> Letter From Ernest 'Fritz' Hollings to W.C. Boyd, 24<sup>th</sup> March 1970, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Carswell, George Harrold, 1970, Folder 2.

<sup>109</sup> Letter from Ernest 'Fritz' Hollings to Robert S. Small, 28<sup>th</sup> November 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Pro, Folder 3.

Drake Edens, Chairman of the Republican National Committee, who claimed that ‘Senator Hollings has been demagoguing and has been demagoguing from the beginning’, adding that Hollings had succeeded in influencing only one vote for Haynsworth, ‘and I’m not sure he was responsible for that.’<sup>110</sup> Edens pointed out that while Strom Thurmond had remained in Washington, DC to defend the Haynsworth nomination, Hollings had spent three weeks on a ‘junket’ to India, adding, ‘I don’t know if Senator Hollings was in India to round up votes for Judge Haynsworth ... but if he was, the Indian delegation didn’t show up in our corner on Friday.’<sup>111</sup> Hollings has continued to insist that the nomination would have succeeded had Everett Dirksen lived, despite Dirksen’s failure to corral support among Republican Senators for Lyndon Johnson’s attempt to promote Abe Fortas to the Chief Justiceship the previous year.<sup>112</sup>

Although Hollings’s disappointment after many weeks of intensive campaigning on behalf of the Nixon Administration may have put him in an indignant mood, his view that the Administration was to blame for the Haynsworth debacle was shared by Senator Russell Long of Louisiana, who argued in a letter to Robert Stoddard, Mayor of Spartanburg, South Carolina, that ‘the South stood solidly behind the President on the Haynsworth vote. If he had done his homework on his side of the aisle, he would have prevailed.’<sup>113</sup> Furthermore, history has not been kind to Richard Nixon’s role in the Haynsworth affair: John Maltese has argued that the lobbying effort on behalf of Haynsworth degenerated into ‘strong-arm tactics that ultimately did more harm than good.’<sup>114</sup> Nixon’s enthusiasm in backing Haynsworth before the nation’s press – despite allegedly nominating him without consulting the American Bar Association or the Republican National Committee or any Senator other than Fritz Hollings – implied

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<sup>110</sup> Massaro, *Supremely Political*, p.99.

<sup>111</sup> ‘Edens Charges Hollings With Playing “Both Sides”,’ undated news clipping, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Con, Folder 5.

<sup>112</sup> Andrea L’Hommedieu Interview with Ernest ‘Fritz’ Hollings, 20<sup>th</sup> June 2012, George J. Mitchell Oral History Project, Bowdoin Digital Commons; Hollings and Victor, *Making Government Work*, p.145.

<sup>113</sup> Letter from Russell Long to Robert L. Stoddard, 10<sup>th</sup> December 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1969, Box 29, Folder 7.

<sup>114</sup> Maltese, *The Selling*, p.77.

that he may have been less concerned with Haynsworth's suitability as a Supreme Court Justice, and more focused on rewarding the South and continuing to build a strong Republican Party in that region.<sup>115</sup>

With the Haynsworth nomination in ruins, Thurmond claimed in his 1<sup>st</sup> December newsletter that 'knowledgeable people have confidence that the President will nominate another conservative, hopefully one from the South.'<sup>116</sup> This hope appeared to have some credibility: on 21<sup>st</sup> November, Nixon wrote to Hollings to thank the Senator for his 'vigorous support' of the Haynsworth nomination and to point out that 'the Court needs men of Judge Haynsworth's philosophy to restore the proper balance to this great institution, and I propose that we continue our effort to provide the Court with such men.'<sup>117</sup> Few, including an already disappointed Hollings, could have anticipated Nixon's next selection of a nominee to fill the vacancy on the Supreme Court.

### **The Astonishing and Puzzling Senator Hollings**

The rejection of Clement Haynsworth only re-enforced a belief among conservative white Southerners that the Supreme Court was no place for any judge who might prove sympathetic to the plight of the South. To make matters worse for those Southerners, the Haynsworth controversy occurred just as the Supreme Court was hammering the final nails into the coffin of Southern segregation. On 29<sup>th</sup> October 1969, the Justices handed down the critical decision in *Alexander v. Holmes County School Board*, which ordered the complete and immediate desegregation of Mississippi's schools.<sup>118</sup> *Brown v. Board of Education*

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<sup>115</sup> Frank, *Clement Haynsworth*, p.27.

<sup>116</sup> Newsletter from the office of Senator Strom Thurmond, 1<sup>st</sup> December 1969, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1970, Box 21, Folder 7.

<sup>117</sup> Letter from Richard Nixon to Ernest 'Fritz' Hollings, 21<sup>st</sup> November 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127; Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. Jr, General, Pro, Folder 4.0

<sup>118</sup> J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (Oxford: Oxford University Press, 1979), p.119-20.

(1954) had provided for desegregation ‘with all deliberate speed’, allowing considerable heel-dragging on the part of state officials, and *Green v. County School Board of New Kent County* (1968) had been open to interpretation with regard to the speed of transition from segregation to a unitary system, but the *Alexander* ruling, thanks largely to the insistence of the ageing Justice Hugo Black, ensured no ambiguity in the order for school districts to desegregate throughout the South.<sup>119</sup>

The condemnation of *Alexander* by Mississippi’s Senator James Eastland was joined by Strom Thurmond, who claimed that ‘the Nixon Administration stood with the South in this case ... but the Court has chosen to override both the state of Mississippi and the Justice Department. I hope something can be done to overcome the effects of this pernicious ruling.’<sup>120</sup> Despite a march of over three thousand white residents of Greenville and Darlington counties to the South Carolina State House in protest at the school desegregation ruling, the state’s Governor, Robert E. McNair, showed no indication that he would reverse the careful transition to racial order which had begun under his predecessor, Fritz Hollings.<sup>121</sup> Announcing that he would oppose any attempt to close down public schools, the Governor declared that ‘we don’t want federal troops in South Carolina. We’ve built a reputation for obedience to the law.’<sup>122</sup> Sixteen years on from *Brown*, the issue of segregated Southern schools continued to rage in the Senate following the *Alexander* ruling, with Fritz Hollings using a debate with South Carolina’s old nemesis, Jacob Javits of New York, to re-iterate his claims of an anti-Southern bias following the Haynsworth rejection. As Charleston’s *News and Courier* reported, ‘Hollings said that 200,000 Negro children are attending segregated schools in New York, but that the Federal Government’s efforts have been directed only against the South. “They’ve developed busing,” Hollings said,

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<sup>119</sup> Woodward and Armstrong, *The Brethren*, p.38-63; ‘Officials Say Court Order Could Affect Most Of South’, *The New York Times*, 30 October 1969, p.34.

<sup>120</sup> ‘Officials Say Court Order Could Affect Most Of South’, *The New York Times*, 30 October 1969, p.34.

<sup>121</sup> Joseph Crespino, *Strom Thurmond’s America* (New York, NY: Hill and Wang, 2012), p.238.

<sup>122</sup> ‘South Carolina Governor To Obey Court On Schools’, *The New York Times*, 28 January 1970, p.1.

“to mix children – where? In North Carolina and South Carolina. Not in New York. Not in Chicago.”<sup>123</sup>

The resurgence of Southern tension over the segregation issue in the years 1969 and 1970 was only exacerbated by President Nixon’s nomination of segregationist Judge G. Harrold Carswell of Florida, in his second attempt to name a Southerner to replace Abe Fortas on the Supreme Court. Unlike the Haynsworth episode, during which no Senator had questioned the nominee’s competence as a judge, some serious questions were raised regarding Carswell’s legal ability, particularly given his lack of published work and the fact that his opinions were rarely, if ever, cited by other judges.<sup>124</sup> There was, however, ample evidence of a consistent anti-civil rights record, which served only to unite the very same organisations which had opposed Haynsworth: in his lengthy statement of opposition, George Meany of the AFL-CIO claimed that ‘the Administration’s sole guide in making its selection was its Southern political strategy.’<sup>125</sup> With a track record of defending white supremacy and a painfully lukewarm rating from the American Bar Association, Carswell was not helped by the now-legendary ham-fisted defence offered by Republican Senator Roman Hruska of Nebraska, who claimed that ‘even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance? We can’t have all Brandeises, Cardozos and Frankfurters, and stuff like that there.’<sup>126</sup> Peter Fish has argued that Nixon, in naming Carswell, responded to the Senate’s rejection of Clement Haynsworth with a ‘spite’ nomination, defined as ‘an ill-disguised strategy of vengeance against the upper chamber – a strategy intended ... to force the Senate into a posture of ironic acceptance of a second-choice nominee possessing professional credentials widely perceived as inferior to

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<sup>123</sup> ‘Hollings, Javits Clash On Schools’, *The News and Courier*, 7 February 1970, p.3A.

<sup>124</sup> McConnell, ‘Haynsworth and Carswell’, pp.7-34, p.23.

<sup>125</sup> Peter G. Fish, ‘Spite Nominations to the United States Supreme Court: Herbert C Hoover, Owen J Roberts and the Politics of Presidential Vengeance in Retrospect’, *Kentucky Law Journal* 77 (1988), pp.545-576; p.553; Laurence H. Tribe, *God Save This Honorable Court* London: Random House, 1985), p.89; Statement of George Meany, President, American Federation of Labour and Congress of Industrial Organisations, submitted to the Senate Judiciary Committee on the Nomination of G. Harrold Carswell to be an Associate Justice of the United States Supreme Court, 2<sup>nd</sup> February 1970, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit and Supreme Court Judges), Year 1970, Box 21, Folder 1.

<sup>126</sup> Henry J. Abraham, *Justices, Presidents and Senators* (New York, NY: Rowman and Littlefield, 1999), p.11.

those of the original nominee.<sup>127</sup> The consequences of Nixon's antagonistic strategy would be catastrophic.<sup>128</sup>

Having taken a back seat during the Haynsworth confirmation hearings, Thurmond was now free to air his opinions on the new nominee, telling one constituent that 'Judge Carswell is a comparatively young man and should be on the Court a long time. I am pleased that President Nixon turned South again to fill this vacancy.'<sup>129</sup> In a news release, the Senator was quick to address the growing criticism of the nominee, making the predictable argument that, 'although they will not admit it, the people who have raised arguments against Judge Carswell's confirmation are opposed to him primarily on the basis of his being from the South.'<sup>130</sup> By complete contrast, Hollings had very little to say. Given that he had been outspoken throughout the deliberations over Haynsworth, and openly critical of the Nixon Administration in the wake of Haynsworth's rejection, the state's press took a great interest in his sudden silence. Speculative articles began to appear in *The News and Courier*, beginning with an observation on 22<sup>nd</sup> March that 'Senator Hollings' hesitation on whether he'll vote for or against confirmation of Judge G. Harrold Carswell as a Supreme Court nominee is, to put it mildly, both astonishing and puzzling.'<sup>131</sup>

Shortly after, Hollings gave an interview in which he made the extraordinary suggestion that if Carswell was not confirmed, he would recommend to President Nixon that he re-nominate Clement Haynsworth.<sup>132</sup> If the Fish assessment is correct, namely, that Nixon hoped that Carswell would be confirmed because Senators did not feel they could get away with a second

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<sup>127</sup> Fish, 'Spite Nominations', p.552.

<sup>128</sup> Michael Comiskey, *Seeking Justices* (Lawrence, KS: University Press of Kansas, 2004), p.67-8.

<sup>129</sup> Letter from Strom Thurmond to Mrs Donald V. Carter, 6<sup>th</sup> February 1970, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 3 (United States District, Circuit, and Supreme Court Judges), Year 1970, Box 21, Folder 1.

<sup>130</sup> News release from the office of Strom Thurmond, 26<sup>th</sup> March 1970, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Press Releases 1970 (January 6, 1970-May 6, 1970), Box 16, Folder 197.

<sup>131</sup> 'Hollings Hesitates', *The News and Courier*, 22 March 1970, p.14A, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Carswell, George Harrold, 1970, Folder 1.

<sup>132</sup> 'Sen. Hollings Temporarily While Carswell Dangles', *The State*, 1<sup>st</sup> April 1970, p.14A, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Carswell, George Harrold, 1970, Folder 3.

rejection, it seems ironic that Hollings thought it possible that the Carswell nomination would be received so poorly by Senators who had opposed Clement Haynsworth that it might actually endear Haynsworth to them if he were nominated a second time. Nonetheless, there was little enthusiasm for Hollings's position in South Carolina's newspapers: *The News and Courier* urged Hollings to back Carswell and, in *The State*, it was believed that 'the Senator's indecision on Carswell might produce damage that could take years to repair.'<sup>133</sup> The sense of frustration was also evident in letters from Hollings's South Carolina constituents, some of whom joined with the state's press in urging him to make his position known.<sup>134</sup>

Privately, Hollings was holding out little hope of a second Haynsworth nomination. In a detailed letter to Fulton B. Creech on 24<sup>th</sup> March 1970, he claimed that 'I have withheld taking a public position on Carswell until after the debates because this was exactly the trouble I found myself in, handling the Haynsworth nomination. Everybody had committed before they listened to the facts. I did not want to be guilty of the same thing.' Describing Carswell as 'nothing to get enthused about', the Senator declared, 'I am proud of the South and, when we put our foot forward, it should be our very best foot. Carswell can't even carry Haynsworth's law books.' Regarding the upcoming vote in the Senate, Hollings claimed, 'in confidence, I will probably vote for him but I am not proud of the vote. I don't believe he is a racist or any of these charges generally about him. I just believe that he is a mediocre lawyer and judge and that if I had a case, I would not associate him in it. Therefore, I see no reason why I should promote him to the highest court.'<sup>135</sup> Hollings discussed the possibility of re-submitting Haynsworth in a letter to the Senior Vice President of the Fidelity Federal Savings and Loan Association, pointing out that 're-submitting the name of a Supreme

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<sup>133</sup> *Ibid.*, p.14A.

<sup>134</sup> Letter from W.M. Hodge and Robert E. Graham to Ernest 'Fritz' Hollings, 3<sup>rd</sup> April 1970; letter from Mrs Robert Hume Lucas to Ernest 'Fritz' Hollings, 2<sup>nd</sup> April 1970, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Carswell, George Harrold, 1970, Folder 3.

<sup>135</sup> Letter from Ernest 'Fritz' Hollings to Fulton B. Creech, 24<sup>th</sup> March 1970, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Carswell, George Harrold, 1970, Folder 2.



Court nominee is not without precedent', citing President Andrew Jackson's successful re-nomination of Roger Taney in 1835, but added that he did not believe 'that this is a realistic consideration about Clement Haynsworth in our present political climate.'<sup>136</sup> To another constituent, he declared, 'I have given some thought to this, but concluded that to re-nominate him would serve to resurrect the same charges by his opponents. I would doubt that the Judge should be expected to undergo this again.'<sup>137</sup>

Hollings eventually endorsed Carswell in a brief, lukewarm statement in the Senate, in which he claimed that his initial silence had 'opened a Pandora's box of editorial nonsense in many of the South Carolina newspapers' before stating his intention to vote for Carswell's confirmation.<sup>138</sup> Following Carswell's rejection the same week, by a vote of 45-51, Hollings received another letter of thanks from President Nixon, who commended him 'for standing by this fine jurist despite the heated campaign of misrepresentation and scurrility that ultimately cost him his confirmation.'<sup>139</sup> With his Southern Supreme Court strategy shot down in flames for a second time, Nixon nominated Minnesotan Judge Harry A. Blackmun to fill the Fortas vacancy. Thurmond remained supportive of the President, and the new nominee, claiming in a statement to the Senate Judiciary Committee that 'Judge Blackmun is a man of high ethical conduct and competence, as were Judge Haynsworth and Judge Carswell.'<sup>140</sup> In an interview reported in the *The Sarasota Herald Tribune*, Thurmond referred to the Carswell rejection as 'a black day in the history of the United States', yet, despite his view that 'it will be impossible to get a judge from the South with strict constructionist

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<sup>136</sup> Letter from Ernest 'Fritz' Hollings to William R. Merritt, 5<sup>th</sup> December 1969, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Haynsworth, Clement F. jr, Gen, Pro, Folder 4.

<sup>137</sup> Letter from Ernest 'Fritz' Hollings to David Karesh, 19<sup>th</sup> October 1971, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Judges, Selection and Appointment, General.

<sup>138</sup> Statement by Senator Ernest F. Hollings on Judge G. Harrold Carswell, 6<sup>th</sup> April 1970, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Carswell, George Harrold, 1970, Folder 3.

<sup>139</sup> Letter from Richard Nixon to Ernest 'Fritz' Hollings, 11<sup>th</sup> April 1970, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 127, Judiciary, Judges, Selection and Appointment, Supreme Court, Carswell, George Harrold, 1970, Folder 2.

<sup>140</sup> Newsletter from the office of Strom Thurmond, 29<sup>th</sup> April 1970, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries B, originals (1947-1970), Press Releases 1970 (January 6, 1970-May 6, 1970), Box 16, Folder 197.

views appointed to the Supreme Court', the Senator concluded optimistically that he was confident in President Nixon naming a Southern judge before the end of his Presidency.<sup>141</sup>

By complete contrast, Hollings portrayed Blackmun's confirmation as further evidence of an anti-Southern prejudice. As with President Eisenhower's appointment of Marylander Simon Sobeloff in 1955, which denied South Carolina representation on the Fourth Circuit Court of Appeals, the Haynsworth rejection was interpreted by Hollings as another, far more significant, insult to his state. Complaining of 'the double standard employed by my colleagues in the Senate as a body, apparently, on whether or not a judge is from South Carolina or Minnesota', Hollings concluded that 'apparently, if one is from South Carolina, the standards or qualifications ... are higher than would be required of a Minnesota judge.'<sup>142</sup> While the Senator could have made a convincing argument by articulating the view later outlined by John Massaro, that 'the clamor surrounding Haynsworth's sense of propriety was primarily employed to conceal ideological considerations', he opted instead to 'regionalise' his comments by speaking of a victimised South – an argument which sounded to some like 'sour grapes' but was nonetheless guaranteed to play well with the folks back home.<sup>143</sup> Blackmun, following his confirmation by a unanimous Senate, would ultimately disappoint conservatives with his record on the Court, not least with his authorship of the majority opinion in *Roe v. Wade* in 1973, which would establish a constitutional right to an abortion, making the mild-mannered Minnesotan an unlikely hero of the women's movement.<sup>144</sup>

On 15<sup>th</sup> May 1970, Marlow Cook declared to the Senate that 'with the confirmation of Harry A. Blackmun by the Senate this week, I believe we have come to the end of an era in Supreme Court history ... To the extent that the recent controversial period has eroded respect for our legal institutions, it has

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<sup>141</sup> 'Nixon Will Get Southerner On Court, Predicts Thurmond In Sarasota Talk', *Sarasota Herald Tribune*, 11 April 1970, p.2B.

<sup>142</sup> Frank, *Clement Haynsworth*, p.124.

<sup>143</sup> Massaro, *Supremely Political*, p.86.

<sup>144</sup> Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York, NY: Henry Holt and Company, 2005), p.222-4.

been a disaster.<sup>145</sup> The Senator from Kentucky re-asserted that Clement Haynsworth had not in fact violated the judicial code, and echoed Hollings's complaints of a double standard when pointing out that Judge Blackmun had also presided over cases involving firms in which he owned stock, yet no objections had been raised by Senators. Cook's response to the Senate's treatment of Haynsworth was to offer five criteria to be used when considering future nominees: 1. Competence; 2. Achievement; 3. Temperament; 4. Judicial integrity, and 5. Non-judicial record. Cook may not have foreseen the troubles which lay ahead for the nomination process in the 1980s and 1990s, but his 'Haynsworth test' does provide another indication of the significance of Haynsworth's rejection during a tumultuous political period, and the influence this episode would have on subsequent nominations.

The 'new standards' speech was largely the work of Cook's Senatorial aide, Mitch McConnell, who used the text as the basis for his article, 'Haynsworth and Parker: A New Senate Standard of Excellence', published in the *Kentucky Law Journal*. He later served as a Deputy Attorney General during the Presidency of Gerald Ford before winning election to the Senate in 1984. As Senate Minority Leader from 2007, McConnell led Republican Senators during the heated confirmation battles over President Barack Obama's nominations of Sonia Sotomayor and Elena Kagan to the Supreme Court, and became Senate Majority Leader in January 2015. McConnell's authorship, as a young man, of Marlow Cook's 'new standards' speech indicates that his recent experiences in the politics of Supreme Court nominations derive from a lengthy involvement in the process, dating back to a very critical period.

The replacement of Abe Fortas with Harry Blackmun did little to soothe the Southern resentment over the treatment of Clement Haynsworth. The South Carolinian's rejection became an issue during the 1970 elections, with Republicans criticising Democratic candidates for their opposition, whether real or imagined.

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<sup>145</sup> Statement by Senator Marlow W. Cook on the floor of the Senate, 15<sup>th</sup> May 1970, p.15, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 126, Judiciary, Judges, Selection and Appointment, Supreme Court, General.

In the Tennessee Senate election, Republican Congressman Bill Brock succeeded in defeating three-term incumbent Democratic Senator Albert Gore, partly through reminding Tennesseans of Gore's opposition to Haynsworth.<sup>146</sup> Over in South Carolina, James B. Edwards, Chairman of the Republican Party in the First Congressional District, alleged, unsuccessfully, that Haynsworth's confirmation had been opposed by the Democratic gubernatorial candidate, Lieutenant Governor John C. West.<sup>147</sup> The moderate Lieutenant Governor would succeed Robert McNair in the Governor's Mansion after defeating his Republican opponent, Congressman Albert Watson, whose Thurmond-endorsed segregationist campaign was damaged badly when two school buses were tipped over in defiance of a segregation order.<sup>148</sup> West later commented that 'the Southern elections of 1970 were the first elections with racial overtones where the moderates won.'<sup>149</sup> In a further suggestion of a changing South Carolina, three African American candidates won election to the State House.<sup>150</sup>

President Nixon later considered, albeit briefly, the nomination of Albert Watson to the United States Court of Military Appeals, but backed down after receiving warnings from Republican leaders that a Watson nomination would fare no better than those of Haynsworth or Carswell. According to *The New York Times*, the opposition to Watson began when Strom Thurmond issued a statement announcing that the nomination had received 'tentative approval' from President Nixon.<sup>151</sup> The failure of Watson's run for Governor, and the refusal of Senators to even consider his nomination for a judicial position, only confirmed the toxic nature of Thurmond's influence in the Senate by 1971. Just as he would adopt more moderate positions on the race issue during the 1970s, the Senator's role as antagonist in the nomination process for Supreme Court Justices would transform peacefully into that of a quiet elder statesman. Having functioned as an

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<sup>146</sup> Letter from Bill Brock, 22<sup>nd</sup> April 1974.

<sup>147</sup> Billy B. Hathorn, 'The Changing Politics of Race: Congressman Albert William Watson and the S.C. Republican Party, 1965-1970', *The South Carolina Historical Magazine* 89:4 (October 1988), pp.227-241; p.237.

<sup>148</sup> *Ibid.*, p.232.

<sup>149</sup> 'New Mood in South', *The New York Times*, 25<sup>th</sup> April 1971, E15; Dewey G. Grantham, *The Life and Death of the Solid South: A Political History* (Lexington, KY: University Press of Kentucky, 1988), p.183.

<sup>150</sup> Cohodas, *Strom Thurmond*, p.412.

<sup>151</sup> 'Nixon Reportedly Drops Plans to Nominate Watson as Judge', *The New York Times*, 28<sup>th</sup> May 1971, p.8.

obstruction to the liberal and moderate appointments of the 1950s and 1960s, Thurmond would now perform the function of shepherding conservative judges through an increasingly partisan nominations process, acting as a crucial sounding board for Ronald Reagan throughout his Presidency.<sup>152</sup> Perhaps the most striking example of Thurmond's transformation appeared during the highly controversial hearings into the nomination of Judge Robert Bork in 1987, by which time Thurmond had become the most senior Republican Senator on the Judiciary Committee. Those who recalled his angry dismissal of the protestations of Marshall and Fortas might have been struck by his objection, twenty years later, to a question from Alabama's Senator Howell Heflin on *Roe v. Wade*, on the grounds that it required Bork 'to express an opinion on a matter that may come before the Supreme Court, and I would think that would be improper.'<sup>153</sup>

Following his resignation as a Justice of the Supreme Court, Abe Fortas returned to private practice, appearing before his old colleagues on the Supreme Court on several occasions, the first of which was recalled vividly by Justice Harry Blackmun. As Laura Kalman has recalled, Blackmun and Fortas made eye contact. Standing before the man who had replaced him on the Supreme Court, Fortas appeared to acknowledge Blackmun with a nod. A curious Blackmun later asked Fortas if he recalled that moment, to which the soft-spoken Tennessean responded, 'I'll never forget it.'<sup>154</sup> It was by no means the only unforgettable moment in an extraordinary life, which would come to an end on 5<sup>th</sup> April 1982, when Fortas died from a ruptured aorta, aged 71. Clement Haynsworth – who would remain on the Fourth Circuit until his own death, aged 77, on 22<sup>nd</sup> November 1989 – would not be the final victim claimed by the nomination process for the Supreme Court. The inimitable Fritz Hollings would ensure, throughout the 1970s and 1980s, and into the 1990s, that the state of South Carolina would continue to play a very unique role in that complicated process. With the Haynsworth fiasco, the state's rapid and volatile political development

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<sup>152</sup> Christine L. Nemacheck, *Strategic Selection* (Charlottesville, VA: University of Virginia Press, 2008), p.69.

<sup>153</sup> Footage of Bork Supreme Court confirmation hearings, 1987 [<https://www.youtube.com/watch?v=5fftOMIJAK>].

<sup>154</sup> Kalman, *Abe Fortas*, p.392.

had been laid bare before the rest of the nation. The attitude of the state's Senators toward the nomination process was perfectly compatible with the conservative backlash embodied by Richard Nixon's election victory, yet the drive for a 'strict constructionist' appointment was woefully at odds with the efforts of other Senators to protect the liberal gains of the past three decades. Furthermore, the unusual prominence of South Carolina in Nixon's 'Southern Strategy' only poisoned the Haynsworth nomination for many others.

The events of 1968-70, as covered in this and the previous chapter, only confirm the importance of South Carolina in the Supreme Court nomination process throughout the era of civil rights. Aside from the fact that the Haynsworth rejection was influenced to a great extent by the outcome of the Fortas Chief Justice nomination, it is clear that both rejections constitute merely two episodes in a twenty-five year period, during which the state was transformed. From Olin Johnston's defence of white supremacy in the fight against *Smith v. Allwright* in the mid-1940s to the triumph of John West in 'the first elections with racial overtones where the moderates won' at the start of the 1970s, South Carolina's confrontational relationship with the Supreme Court had sparked a war of many battles. The Rock Hill protests, the peaceful desegregation of Clemson, the Orangeburg Massacre, and the troubled gubernatorial election of 1970 provide a modest number of incidents for scholars of 'massive resistance' to explain the story of South Carolina's comparatively quiet period of racial transition, but it remains the case that the state's politicians acted as persistent pugilists in the US Senate.<sup>155</sup> From 1954 until 1970, the distinguished upper chamber of Congress became a battlefield in which South Carolina's Senators fought the appointment of Simon Sobeloff to the Fourth Circuit; established a record-breaking filibuster against civil rights legislation; obstructed Thurgood Marshall's rise to the Second Circuit and, later, to the Supreme Court; triggered the landmark Senate rejection of Abe Fortas as Chief Justice, and, finally, failed to engineer the appointment of

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<sup>155</sup> For more on scholarly interpretations of South Carolina's civil rights era, see John Monk, 'Preface', in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.xxi-xxiv.

one of their own to the nation's highest court. The war waged by South Carolina culminated in – to borrow Marlow Cook's words once again – a truly unforgettable era in the history of the Supreme Court.

Yet this is a story with a lengthy epilogue. As Chapter Seven will explain, the conservative attitude of South Carolina's Senators toward the Supreme Court nomination process did not disappear from view following the Haynsworth debacle. Although unhappy that the South Carolinian judge had been rejected, Strom Thurmond's contentment with the conservative nominees offered by Republican Presidents would continue throughout his remaining years in the Senate, while Hollings's lingering bitterness was palpable in his attitude toward subsequent nominations. Chapter Seven will conclude the story of South Carolina and the Supreme Court by assessing the remarkable consistency evident in the voting record of the enigmatic Hollings. As will become clear, his approach toward nominations remained strangely unaltered despite the enormous changes taking place in South Carolina, many of which he had initiated as the state's Governor prior to arriving in the Senate.

## **CHAPTER SEVEN:**

### **Dynamic Conservatism:**

#### **Fritz Hollings and the Nomination of Supreme Court Justices, 1971-2005**

*We are conservative, in the sense that we seek to conserve those principles of government, and of free enterprise, which have been tried and proved ... We in South Carolina see no conflict between such conservatism and progress; indeed, we think they go hand in hand toward bringing us a better life, and it is our mission to put forward a dynamic conservatism as an asset, not a liability.<sup>1</sup>*

Ernest F. Hollings, 20<sup>th</sup> January 1959

With his insistence that racial segregation would be maintained in South Carolina's public schools, Ernest 'Fritz' Hollings, in his inaugural address as Governor, revisited one of the campaign promises that had ensured his election in November 1958.<sup>2</sup> As with all of Hollings's public statements on the segregation issue from the 1950s and early 1960s, the inaugural address provides insight into the complexities of his lengthy career as a Southern politician. His argument that educational opportunities would be ensured only through the maintenance of segregation is remarkable if only for the fact that, as Governor, Hollings would

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<sup>1</sup> Inaugural address of The Honorable Ernest F. Hollings as Governor of South Carolina, Columbia, 20<sup>th</sup> January 1959, p.5, South Carolina Political Collections, Oral History Project, University of South Carolina [<http://digital.tcl.sc.edu/cdm/compoundobject/collection/how/id/349/show/340/rec/2>].

<sup>2</sup> Earl Black, *Southern Governors and Civil Rights* (Cambridge, MA: Harvard University Press, 1976), p.80-2; Anthony J. Badger, 'From Defiance to Moderation: South Carolina Governors and Racial Change', in Anthony J. Badger, *New Deal/New South: an Anthony J. Badger Reader* (Fayetteville: University of Arkansas Press 2007), pp.127-143; p.135-6; James C. Cobb, *The Selling of the South* (Chicago: University of Illinois Press, 1993), p.141.



preside over the highly symbolic desegregation of Clemson University.<sup>3</sup> In his memoirs, Hollings claimed that a visit to an elementary school for African American children early in his career inspired him to reform the state's education system as Governor: 'given what I had just seen, I realised that minority education was separate but certainly not equal.'<sup>4</sup> While Hollings had advocated resistance to the Supreme Court in January 1959, arguing that education, as a practical matter, 'can only be done in the segregated pattern', the outgoing Governor would argue in his farewell address of 1963, shortly after overseeing the peaceful integration of Clemson, that acceptance of *Brown for Board of Education* 'is a hurdle that brings little progress to either side. But the failure to clear it will bring us irreparable harm.'<sup>5</sup>

Within the existing literature, the significance of Fritz Hollings as a Southern political figure is attributed to three aspects of his career. Firstly, his role in guiding South Carolina through a period of political transition via a co-ordinated acceptance of desegregation has been recognised by several scholars of Southern politics. Tony Badger has claimed that a measure of 'self-congratulation' is warranted for Hollings's contribution, while Robert Mickey has argued that 'a peaceful, if token, desegregation' was achieved through Hollings's success in negotiating with federal officials and repressing the state's white supremacist forces.<sup>6</sup> Secondly, Hollings's role in introducing a comprehensive system of technical training is considered a highly significant development in South Carolina's history, with Jack Bass and W. Scott Poole praising his skill in convincing the state legislature to help him finance the creation of 'a willing, inexpensive and trained workforce', a process which constituted, in the words of James C. Cobb, 'one of the pioneering responses to the need for a flexible but effective industrial

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<sup>3</sup> Inaugural address, p.5.

<sup>4</sup> Ernest F. Hollings and Kirk Victor, *Making Government Work* (Columbia, SC: University of South Carolina Press, 2008), p.16.

<sup>5</sup> Inaugural address, p.4; Address by Governor Ernest F. Hollings to the General Assembly of South Carolina, 9<sup>th</sup> January 1963, South Carolina Political Collections, Oral History Project, University of South Carolina; 'Hollings Says Farewell, Sees Desegregation', *The Times-News, Hendersonville, North Carolina*, 10<sup>th</sup> January 1963, p.3.

<sup>6</sup> Badger, 'From Defiance', p.143; Robert Mickey, *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015), p.239.

training program.’<sup>7</sup> Finally, Hollings’s survival as a Democratic Senator over a thirty-eight year period in an increasingly conservative state provides one of the more significant examples of Nicol Rae’s characterisation of Southern Democrats as an ideologically flexible faction, focused primarily on local and regional concerns.<sup>8</sup> For the purposes of this chapter in analysing Hollings’s involvement in the Supreme Court nomination process, perhaps the most notable remark from his 1959 inaugural address is the argument outlined at the beginning of this chapter. His claim ‘to put forward a dynamic conservatism as an asset, not a liability’ can be read as a bold statement of intent, in the sense that a combination of conservatism and progress was present throughout his Senate career, and can also be offered as an explanation for his survival as a Southern Democrat despite the Republican Party’s dominance in South Carolina by the time of Hollings’s retirement in 2005.

With his Brylcreemed hair, boyish good looks and verbal eloquence, the dynamic young Governor was an obvious contender for a United States Senate seat, and it remains significant that most of the literature which recognises Hollings’s importance has overlooked his lengthy career as a Senator. Nicol Rae has noted the significance of Hollings’s aborted presidential run in 1984, and also his support for Robert Bork’s Supreme Court nomination in 1987, yet the South Carolinian was not among the many Southern Democrats interviewed by Rae over the course of his research. Similarly, John P. Frank, who has produced the most comprehensive study of the Clement Haynsworth nomination, noted the significance of Hollings in recommending and promoting Haynsworth, yet he did not interview the Senator, nor did he obtain access to his personal papers. With most studies of Southern political history focusing on state-level activities, black protest movements, massive white resistance, and other political activity prior to the early 1970s, the existing literature has focused almost entirely on Hollings’s four years as Governor.

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<sup>7</sup> Jack Bass and W. Scott Poole, *The Palmetto State: The Making of Modern South Carolina* (Columbia: University of South Carolina Press, 2007), p.112; Jack Bass and Walter DeVries, *The Transformation of Southern Politics* (Athens, GA: University of Georgia, 1995), p.250; Cobb, *The Selling*, p.166.

<sup>8</sup> Nicol C. Rae, *Southern Democrats* (Oxford: Oxford University Press, 2004), p.4.

Hollings was one of the more distinctive characters in the US Senate, not least through the rich, stirring tones of his voice, which contrasted markedly with the deep, 'slow-as-molasses' baritone of Olin D. Johnston, and especially with the unyielding nasal bark of Strom Thurmond.<sup>9</sup> The inimitable Hollings voice was used to devastating effect through slang, such as his references to 'ponying up' sums of money; terms such as 'shenanigans' and 'accoutrements', and also the occasional Malapropism. One example is his questioning, as a member of the Senate Commerce Committee, of Attorney General Janet Reno during hearings into violence on television in 1993, during which he singled out the anarchic animated show, *Beavis and Butthead*. The Senator from South Carolina declared, 'We've got this, what is it, *Buffcoat and Beaver*, or *Beaver* and something else, that they had – I haven't seen it, I don't watch it, but whatever it is, it was at seven o'clock – *Buffcoat* – and they put it on now at ten-thirty, I think. They've pleaded guilty, and they'll do it as long as you and I have hearings.' In a remarkable showcase of his heavy Charleston accent, Hollings argued that 'we just can't have hearings like we've had now for forty yee-ahs and get no-wee-ah.'<sup>10</sup> On other occasions, his idiosyncratic comments resulted in a number of gaffes. Hollings offered an apology to Senator Howard Metzenbaum of Ohio for referring to him as 'the Senator from B'nai Brith', and responded to the claims of Japanese leaders that Americans are 'lazy' by reminding them that the atomic bomb was 'made in the United States and tested in Japan.'<sup>11</sup>

Politically, Hollings's complex ideology was characterised by contradictions. Alongside the concern shown for the plight of African Americans living in poverty, as indicated by his 'hunger tour' of 1969-70, was a lengthy battle for fiscal conservatism evidenced by the Gramm-Rudman-Hollings Balanced Budget Act of 1985, his collaboration with Republican Senators Phil Gramm of Texas and Warren Rudman of New Hampshire.<sup>12</sup> Hollings's brand of 'dynamic

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<sup>9</sup> Hollings and Victor, *Making Government Work*, p.103.

<sup>10</sup> Footage of Commerce Committee hearings into violence on television, 1993 [<https://www.youtube.com/watch?v=3lobkzXRt-o>].

<sup>11</sup> 'A Bitter Rivalry in South Carolina', *The New York Times*, 30<sup>th</sup> October 1992.

<sup>12</sup> Walter Edgar, *South Carolina: A History* (Columbia, SC: University of South Carolina Press, 1998) p.542.

conservatism' often led him to vote against a majority of his fellow Democrats in the Senate: he was one of only two Democratic Senators to vote in favour of Robert Bork's confirmation as a Supreme Court Justice in 1987, and one of only two Democrats to vote against the Family and Medical Leave Act of 1993, which aimed to ensure the provision of unpaid leave for employees requiring time off due to medical or family-related circumstances.<sup>13</sup>

While Hollings has been very candid in discussing his passion for balancing the federal budget, he has been far less vocal on the issue of his voting record in the nomination of Supreme Court Justices. In tracing Hollings's journey as a Senator by examining his involvement in the Supreme Court nomination process, this chapter will highlight one of the crucial yet neglected aspects of his career as a Southern politician. Hollings utilised the nominations process as a means of displaying his conservative credentials to his South Carolina constituents in a manner that illustrates his attention to the local and regional concerns highlighted by Nicol Rae. Despite his willingness to distance himself from Thurmond, Hollings's voting record in the nomination process highlights the often overlooked fact that the two Senators were products of the same South Carolinian political tradition, and shared many ideological similarities which were in place long before Hollings arrived in the Senate. Only four years prior to Hollings's declaration that 'we in South Carolina see no conflict between such conservatism and progress; indeed, we think they go hand in hand toward bringing us a better life', Thurmond had outlined his belief in 'forward-looking moderation', stating that 'Some call it conservatism. Some condemn it as reactionary, but I believe it to be a sound approach to most of the problems which we have faced in the past and which we must face in the future.'<sup>14</sup>

In offering this lengthy and rather curious epilogue in the story of South Carolina and the Supreme Court, the chapter will analyse in depth Fritz Hollings's

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<sup>13</sup> Rae, *Southern Democrats*, p.105; US Senate Roll Call Votes, 103<sup>rd</sup> Congress – 1<sup>st</sup> Session, HR1 – Family and Medical Leave Act, 4<sup>th</sup> February 1993.

<sup>14</sup> Address by Senator Strom Thurmond Before the Southern Society at the Plaza Hotel, New York, 14<sup>th</sup> January 1955, p.22, Strom Thurmond Collection, Mss.0100.11, Speeches Series 1935-1998, Subseries A, General File (1935-1983), Addresses 1955, Box 7, Folder 604.

conservative nomination record in a manner which highlights once again the need, as outlined in research objective (3), to assess the politics of judicial nominations as a continuous developmental process, rather than in the form of 'one-off' events. In assessing Hollings's position on the nominations of Lewis Powell and William Rehnquist (1971), and later, Robert Bork (1987) and Clarence Thomas (1991), a case will be made that the conservative Hollings record proved to be a vital component of his success in winning re-election as a Southern Democrat Senator in the South Carolina of the late twentieth century. The view of scholars that Hollings ultimately established a track record of forward-looking racial moderation has obscured the extension of his conservative ideology throughout his years in the Senate: as will be explained, his record in the nominations of Supreme Court Justices frequently tested the patience of his African American supporters, but did prove effective in solidifying his support among white conservatives.

The chapter concludes by offering a brief analysis of South Carolina's war on the Supreme Court, pointing once again the need of research objective (4) to draw together the study of Southern politics with the history of the Supreme Court nomination process. The significance of this particular theme is then explored in greater depth in the concluding chapter of the thesis.

### **Both Sides of His Mouth**

As illustrated in Chapters Four and Five, the positions taken by Hollings on the Supreme Court nominations made by President Lyndon Johnson proved to be far more complex than those adopted by Olin Johnston and Strom Thurmond. His skill in choosing his targets carefully and refusing to associate himself too closely with any particular group or institution reflects not only the South Carolinian trait of independence, but also a mastery of diplomacy which would ensure his survival during an unpredictable era of racial violence and political transition. Perhaps

unsurprisingly, it was during his turbulent four-year term as Governor that Hollings developed the ability to navigate his way through a complex political landscape. On the one hand, this would involve expressing a commitment to the continuation of racial segregation as well as frequent condemnations of the National Association for the Advancement of Colored People (NAACP), including the view that 'if the Supreme Court can declare certain organisations as subversive, I believe South Carolina can declare the NAACP both subversive and illegal.'<sup>15</sup> On the other hand, Hollings would ensure the safety of black protesters and prepare the state for the desegregation of Clemson while at the same time maintaining cordial relationships with white conservatives engaged in 'massive resistance'.

An example of the Hollings brand of diplomacy was evident in the Governor's communications with the white Citizens' Councils, which were set up in response to the Supreme Court's order to desegregate public schools. In public, Hollings maintained his support, stating that 'the Citizens' Councils, by mobilizing the best leadership at the community level, can help to restore decency in government and maintain peace and security for all people, both white and Negro.'<sup>16</sup> On 2<sup>nd</sup> December 1960, Hollings was asked by Ralph B. Kolb, Chairman of the South Carolina Citizens' Council, to stand with the Governors of Mississippi, Alabama and Georgia in 'strengthening the position' of Louisiana's Governor Jimmie Davis during the crisis over the integration of William Frantz Elementary School in New Orleans.<sup>17</sup> In his brief response, Hollings claimed to offer 'sympathy and support' for Governor Davis, to which an unsatisfied Kolb replied, 'we do not believe a routine expression of sympathy and support generally, under conditions now existing in Louisiana, is sufficient.'<sup>18</sup>

Hollings proved particularly diplomatic following the election of arch segregationist Ross Barnett as Governor of Mississippi in November 1959. On 19<sup>th</sup>

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<sup>15</sup> Badger, 'From Defiance', p.135.

<sup>16</sup> Mickey, *Paths Out of Dixie*, p.223-4.

<sup>17</sup> Letter from Ralph B. Kolb to Ernest 'Fritz' Hollings, 2<sup>nd</sup> December 1960, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Citizens' Council, c.1959-1963.

<sup>18</sup> Letter from Ernest 'Fritz' Hollings to Ralph B. Kolb, 3<sup>rd</sup> December 1960; letter from Ralph B. Kolb to Ernest 'Fritz' Hollings, 5<sup>th</sup> December 1960, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Citizens' Council, c.1959-1963.

December, he received a letter from Mrs Bessie S. Britton, a Kingstree, South Carolina resident and Citizens Council member, expressing concern over a 'rumour' that Hollings had declined to introduce Barnett at a Council meeting in South Carolina, to be held in the New Year. A notably frank and detailed draft was composed, in which Hollings claimed that:

South Carolina is fortunate to be free of undue problems in racial relationships. I can best serve all South Carolinians at this time in helping to preserve this stability and way of life by maintaining separate status as Governor without identification with any groups, regardless of how worthy may be their purposes in the field of race relations. I have high personal respect and admiration for the objectives of the Citizens Councils and am greatly appreciative of their work in maintaining good relations between the races in our state.<sup>19</sup>

By 28<sup>th</sup> December, however, when the response was sent to Mrs Britton, it was much shorter and read very differently, with Hollings declaring, 'I am sorry I will not be able to attend the Citizens' Council meeting on January 29 due to other commitments. I can't tell from your letter what the rumor is, but assure you that my inability to attend is not because of an attitude against the Citizens Council, which I have always supported.'<sup>20</sup>

Around the same time, Hollings was contacted by Farley Smith, Executive Secretary of the Association of Citizens' Councils, who expressed concern that Hollings did not seem to approve of the Association's invitation to Governor-elect Barnett.<sup>21</sup> As a 'suggestion' of how Hollings could respond to Smith, a draft was composed in the Governor's office, outlining that 'I have the greatest admiration for Governor-elect Barnett of Mississippi and I feel that your selection of him as a speaker is an excellent one. However, I am of the opinion that you are making a mistake in having this meeting at this time and I sincerely feel that the Citizens'

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<sup>19</sup> Letter from Bessie S. Britton to Ernest 'Fritz' Hollings, 19<sup>th</sup> December 1959; draft of response to Bessie S. Britton, undated, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Barnett Conference, 1961.

<sup>20</sup> Letter from Ernest 'Fritz' Hollings to Bessie S. Britton, 28<sup>th</sup> December 1959, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Barnett Conference, 1961.

<sup>21</sup> Letter from Farley Smith to Ernest 'Fritz' Hollings, 1<sup>st</sup> December 1959, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Barnett Conference, 1961.

Council should not get in a running fight with the NAACP.’<sup>22</sup> By 7<sup>th</sup> December, when Hollings’s response was sent to Smith, it had been reduced to only one line, reading, ‘I have never had the pleasure of meeting Governor Barnett and told you of my limited knowledge when you and Mr Dinkins were in Columbia.’<sup>23</sup>

Hollings’s decision not to align himself with Barnett ultimately proved to be an astute move. When Barnett advocated open resistance to the admission of black student James Meredith to the University of Mississippi in September and October 1962, and expected other Southern Governors to back him, Hollings reverted to his usual diplomacy. As Hollings recalled years later, Barnett telephoned him and requested that he arrange for motorcades from cities in South Carolina, Georgia and Alabama to head to Oxford, Mississippi to undertake a united Southern resistance to federal orders to integrate the university. According to Hollings, ‘I told Ross at the time, I said, that would be a very dangerous thing. I can't think of anybody following me in a motorcade, for a showdown to Oxford, Mississippi, that wouldn't include every kook, red-neck, crack-pot, Ku Klux Klanner, and everything else that you could find and they'd all follow me out and expect me to do something when I got there ... He didn't like that at all, got rather angry about it at the time.’<sup>24</sup> Publicly, however, Hollings was forced to give consideration to the feelings of many of his white conservative constituents. *The New York Times* quoted him as claiming, ‘it is a very sad thing ... the people of South Carolina are 100 per cent in sympathy with the people of Mississippi.’<sup>25</sup> As with the draft of his letter to Farley Smith, criticising the decision to hold the Citizens’ Council meeting, rather than criticising Barnett himself, Hollings was careful to claim solidarity between the people of South Carolina and the people of Mississippi, rather than solidarity between himself and Barnett.

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<sup>22</sup> Draft of response to Farley Smith, undated, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Barnett Conference, 1961.

<sup>23</sup> Letter from Ernest ‘Fritz’ Hollings to Farley Smith, 7<sup>th</sup> December, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Barnett Conference, 1961.

<sup>24</sup> Marcia Synnott Interview with Ernest F. Hollings, 8<sup>th</sup> July 1980, South Carolina Political Collections, Oral History Project, University of South Carolina [<http://library.sc.edu/file/1786>].

<sup>25</sup> ‘Vandiver Assails Barnett Stand And Calls for Obedience to Law’, *The New York Times*, 1<sup>st</sup> October 1962, p.24.



Unlike the erratic Barnett's mismanagement of the Oxford crisis, Hollings had avoided a large-scale outbreak of violence during the sit-in protests in Rock Hill, South Carolina by replacing the town's white officers with black officers sent in from elsewhere in the state.<sup>26</sup> Despite having claimed in a telegram to President Eisenhower that owners of private diners were not obliged to serve anyone who walks into their premises, the Governor, in his own words, did not want 'the little minority kids at the stools to be crowded by the white punks with peg-legged britches and ducktail haircuts who were waiting to dive and grab a seat as soon as the little black child got up to go to the bathroom.'<sup>27</sup> While avoiding making public his concern for the safety of 'the little minority kids', Hollings did write to Farley Smith to thank the Association of Citizens' Councils for their co-operation in promoting law and order in Rock Hill during the sit-in protest, telling Smith, 'You have done a fine service for the people of Rock Hill and the people of South Carolina.'<sup>28</sup> Even in his legendary farewell speech in January 1963, Hollings maintained the same style of diplomacy by emphasising the importance of law and order over personal emotion, rather than making an open, and unthinkable, call for the acceptance of racial integration in public places.<sup>29</sup>

As a result of the political manoeuvring necessitated by the complex management of his state, black South Carolinians have been divided on Hollings's term as Governor. The legendary NAACP activist Modjeska Simkins claimed in 1976 that she still opposed Hollings, recalling a protest at South Carolina State College in Orangeburg in 1960:

They didn't have enough space in the jail. They put them in an enclosure, a wired-in enclosure around the jail. It was a cold, freezing day – well, I won't say it was freezing, but it was very bitter cold. And some of those

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<sup>26</sup> Hollings and Victor, *Making Government Work*, p.77.

<sup>27</sup> David A. Nichols, *A Matter of Justice: Eisenhower and the Civil Rights Revolution* (New York, NY: Simon and Schuster, 2007), p.251; Hollings and Victor, *Making Government Work*, p.76-7.

<sup>28</sup> Letter from Ernest 'Fritz' Hollings to Farley Smith, 24<sup>th</sup> February 1960, Ernest F. Hollings Collection, Gubernatorial Papers, Box 14, Citizens' Council, c.1959-1963.

<sup>29</sup> 'Hollings Says Farewell, Sees Desegregation', *The Times-News, Hendersonville, North Carolina*, 10<sup>th</sup> January 1963, p.3.

children were water-hosed. They rolled on the ground with the force of the hose. And Hollings was Governor. He did nothing about it.<sup>30</sup>

Alternatively, James Clyburn, another active participant in South Carolina's civil rights movement before his appointment as a 'minority advisor' to Governor John C. West in 1970, and election to the US House of Representatives in 1992, offers a more balanced appraisal:

I think he's a very shrewd politician. I guess every time I went to jail, he was Governor. But he never stood in the doorway of progress. This 'massive resistance' never took place in South Carolina as it did in Mississippi, Alabama, Louisiana, Arkansas, simply because people like Fritz Hollings took a different tack.<sup>31</sup>

In his memoirs, Hollings neglected to mention the wire enclosure, and instead recalled the Orangeburg protest with his usual folksiness, joking that 'Clyburn needles me about that episode; he says I hosed him down but didn't kill him', and also tells a touching story of how Clyburn met his future wife, Emily, in the courthouse after the arrests.<sup>32</sup>

Following his election to the Senate in November 1966, Hollings would be required to refine his instincts in the complicated political arena of providing, or withholding, senatorial consent to presidential nominations for the US Supreme Court. The Haynsworth episode, discussed in the previous chapter, demonstrates the Senator's perception, and acceptance, of how judges were viewed by the conservative white voting majority in South Carolina during the era of civil rights. The shift from an ambiguous position on two liberal nominees to a policy of open endorsement of a conservative nominee is consistent with the style of diplomacy practiced by Hollings while Governor. In making the case for Haynsworth, the Senator was able to play down the effects of the nominee's little-known decisions by emphasising his sound constitutional judgement, while in the case of Marshall

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<sup>30</sup> Oral history interview with Modjeska Simkins, 28<sup>th</sup> July 1976, Interview G-0056-2, Documenting the American South, University Library, University of North Carolina at Chapel Hill [[http://docsouth.unc.edu/sohp/playback.html?base\\_file=G-0056-2&duration=05:45:13](http://docsouth.unc.edu/sohp/playback.html?base_file=G-0056-2&duration=05:45:13)].

<sup>31</sup> Interview with James Clyburn, 3<sup>rd</sup> October 2014.

<sup>32</sup> Hollings and Victor, *Making Government Work*, p.78.

and Fortas, Hollings knew from the outset that he would never be able to 'sell' a liberal judicial philosophy to Southern conservatives, nor would he ever be able to play down the impact of *Brown* or *Miranda* or any other landmark Supreme Court decision which either man had been involved in. His re-election victory in November 1968 suggested that his votes against the Marshall and Fortas nominations had been handed skilfully and diplomatically, but, as this chapter will suggest, the sense of defeat felt by Hollings following the Haynsworth affair would influence his unique and often puzzling behaviour over the course of subsequent nominations.

When the dust had finally settled following the Haynsworth and Carswell rejections, Hollings may not have shared Strom Thurmond's optimistic prediction of another Southern Supreme Court nominee before the end of the Nixon Presidency, but the announcement in September 1971 that Justice Hugo Black, the Court's only Southerner, was to retire, provided the President with an air-tight justification for naming a third Southern judge. *The Los Angeles Times* noted that Nixon was considering as many as seven Southerners for the vacancy, noting that the President was also seeking out 'a nominee who believes in a strict interpretation of the Constitution.'<sup>33</sup> According to former White House counsel John W. Dean, Nixon told Attorney General John Mitchell that Black's replacement must be a Southerner, and 'must be against busing, and against forced housing integration. Beyond that, he can do what he pleases. He can screw around on, you know, economics and et ceteras.'<sup>34</sup> With his selection of the inoffensive Virginian Democrat Lewis F. Powell, a former President of the American Bar Association, Nixon finally succeeded in naming a Southerner with impeccable legal credentials and little or no controversy, race-related or otherwise, to his name. Yet, the Powell nomination would become overshadowed by Nixon's selection of William Rehnquist, Assistant Attorney General for the Office of Legal Counsel, to replace Justice John Marshall Harlan II, whose retirement became known only one week

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<sup>33</sup> '7 Southerners on List for Black's Court Seat', *The Los Angeles Times*, 21<sup>st</sup> September 1971, Strom Thurmond Collection, Subject Correspondence Series, Mss.0100.18, 2-3 Supreme Court, Year 1971, Box 5, Folder 1.

<sup>34</sup> John W. Dean, *The Rehnquist Choice* (New York, NY: Touchstone, 2001), p.47.

after Hugo Black's announcement. Following the nominations of Powell and Rehnquist on the same day, 21<sup>st</sup> October 1971, Senators braced themselves to scrutinise two Nixon nominees at once.<sup>35</sup>

The American Civil Liberties Union (ACLU) was sufficiently alarmed by Rehnquist's conservatism that it broke a time-honoured tradition of never formally opposing a nominee for public office, and called openly for Rehnquist's rejection.<sup>36</sup> During confirmation hearings, Hollings's nemesis, Senator Birch Bayh of Indiana, asked the nominee if he had ever challenged or harassed black or Hispanic voters at polling booths in his home state of Arizona, which Rehnquist denied.<sup>37</sup> In addition to writing to Judiciary Committee Chairman James Eastland to protest his innocence, Rehnquist submitted a sworn affidavit to contradict accusations of harassment made by six witnesses. John W. Dean, who claims responsibility for influencing Nixon's choice of Rehnquist, has conceded that a 'lack of vetting left [Rehnquist] ill-prepared to fend off attacks. Even during the hearings themselves, the White House was half-asleep.'<sup>38</sup> Before long, Judiciary Committee member John V. Tunney of California announced his opposition to confirmation, arguing that:

[Rehnquist's] justification of a vast expansion of the Subversive Activities Control Board, his defense of unrestricted governmental surveillance, his rationale for preventive detention, all of these demonstrate that he is quite the reverse of a 'strict constructionist'. He, instead, seems quite willing to read into the powers of the Executive branch an unrestricted latitude which threatens the very basis of individual freedoms.<sup>39</sup>

Noting Rehnquist's relative youth and the fact that 'he could still be serving on the Court in the year 2000', Tunney claimed that the nominee was ill-suited to serve on the Supreme Court during a period of 'profound social and

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<sup>35</sup> R. Sam Garrett and Denis Steven Rutkus, 'Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2009', published by *Congressional Research Service* (8<sup>th</sup> May 2009), p.25.

<sup>36</sup> Henry J. Abraham, *Justices, Presidents and Senators* (New York, NY: Rowman and Littlefield, 1999), p.269.

<sup>37</sup> Dean, *The Rehnquist Choice*, p.270-1.

<sup>38</sup> *Ibid.*, p.270-1.

<sup>39</sup> Statement of Senator John V. Tunney in Opposition to the Supreme Court Nomination of Assistant Attorney General William Rehnquist, 18<sup>th</sup> November 1971, p.1; Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Supreme Court, Rehnquist, William, General, Folder 1.

political changes in this country' and complained that 'it is singularly inappropriate for those who favor Mr Rehnquist's nomination to attempt to hold Mr Powell hostage in their endeavour.'<sup>40</sup> The controversy over the Rehnquist selection meant that, finally, the President was able to get a Southerner confirmed to the Court without inconvenience, as one editorial noted: 'The curious thing about the entire exercise is that Powell, who has come in for virtually no criticism, almost certainly is just as conservative as Rehnquist.'<sup>41</sup>

In seeking to defend the Rehnquist nomination by offsetting the unexpected accusations of racism, Hollings requested the views of fellow South Carolinian Ben Holman, former director of the Community Relations Service, a wing of the Justice Department created by the Civil Rights Act of 1964 to manage community conflicts brought about by racial tension. In his response, Holman explained that Rehnquist 'has been highly supportive of our cause and on several occasions sought to broaden our statutory mandate', adding that, 'as a black man sensitive to the various forms of racist behaviour, I can assure you that Bill Rehnquist will judge minorities fairly if he is confirmed to the Court.'<sup>42</sup> Armed with a weapon to use against Rehnquist's critics, Hollings took the time to quote 'the black man who heads the Community Relations Service' in letters to constituents, and also quoted Holman in a speech on the Senate floor, requesting that the complete letter be printed for the record.<sup>43</sup>

In other communications to his constituents, Hollings emphasised that he had got to know Rehnquist during the previous year's unsuccessful Justice Department drive to confirm Clement Haynsworth. The Senator's comments on Rehnquist's conservatism in these letters ('Some attack Mr Rehnquist for his conservatism. Yet a strong article of conservatism has always been the strong

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<sup>40</sup> Dean, *The Rehnquist Choice*, p.1. Rehnquist became Chief Justice of the United States in 1986 and served until his death in 2005.

<sup>41</sup> 'The Advocate', *The Evening Star*, 11<sup>th</sup> November 1971, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Supreme Court, General.

<sup>42</sup> Letter from Ben Holman to Ernest 'Fritz' Hollings, 4<sup>th</sup> November 1971, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Supreme Court, General.

<sup>43</sup> Letter from Ernest 'Fritz' Hollings to Sister Bernetta Quinn, 22<sup>nd</sup> November 1971; Text of Remarks by Senator Hollings on the Floor of the Senate, 6<sup>th</sup> December 1971, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Supreme Court, General.

emphasis on individual liberties') provide another example of Hollings using a 'strict constructionist' approach to judicial interpretation as a selling point when defending a nominee, without reflecting on the potential consequences of the nominee's decisions.<sup>44</sup> His claim that 'I believe [Rehnquist] holds the First Amendment and the rights of the individual in highest respect' does not acknowledge that a judge can hold the original meaning of the First Amendment 'in highest respect' while at the same time handing down decisions which fail to protect the rights of all individuals all of the time.<sup>45</sup>

With Strom Thurmond and others on the Senate Judiciary Committee supporting both nominees, and in the absence of a 'Vend-A-Matic'-style controversy, Birch Bayh knew that his opposition to William Rehnquist stood no chance of developing the same momentum that his campaign against Clement Haynsworth had managed to generate. His most potent weapon – a one-and-a-half page memorandum written by Rehnquist in 1952 while working as a law clerk for Justice Robert Jackson, in which the nominee had apparently advised the late Justice that the 'separate but equal' doctrine of *Plessy* should be upheld – proved ineffective in gathering support for his opposition. Rehnquist maintained that he had outlined only one hypothetical position for Jackson to adopt when considering his opinion in *Brown*, but many Senators remained unconvinced, not least because the memo was written in the first person, with the line 'I have been excoriated by my "liberal" colleagues but I think *Plessy* was right' seeming to provide incontrovertible evidence of Rehnquist's racial conservatism.<sup>46</sup> Nonetheless, with only Bayh and Senators Philip Hart of Michigan, Edward Kennedy of Massachusetts, and John Tunney of California, voting against Rehnquist in Committee, the nominations went to the full Senate. Powell received only one negative vote when he was confirmed on 6<sup>th</sup> December 1971, while

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<sup>44</sup> Letter from Ernest 'Fritz' Hollings to Peter Murray, 10<sup>th</sup> December 1971, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Supreme Court, General.

<sup>45</sup> Letter from Ernest 'Fritz' Hollings to Louise G. Gasque, 29<sup>th</sup> November 1971, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Supreme Court, General.

<sup>46</sup> Dean, *The Rehnquist Choice*, p.274-5.

Rehnquist was confirmed by a vote of 68-26 on 10<sup>th</sup> December, with Bayh's effort to mount a filibuster defeated by a vote of 70-22.<sup>47</sup>

For John Dean, the appointment of William Rehnquist, who would later be promoted to the position of Chief Justice by President Ronald Reagan, 'redefined the Supreme Court, making it a politically conservative bastion within our governmental system ... With Rehnquist, Nixon found the conservative who would sit on the high bench for three decades.'<sup>48</sup> The process initiated by the once-unlikely double act of Richard Nixon and Strom Thurmond had proved remarkably successful. With his enthusiastic backing of Nixon's Southern Supreme Court strategy, the senior Senator from South Carolina began mellowing into the persona of a kindly elder statesman, smiling benevolently upon each Republican nominee offered by Republican Presidents Nixon, Ford and Reagan during the 1970s and 1980s. Fritz Hollings, despite the apparent political contrast with his South Carolina colleague, remained locked into the very same process of crafting a conservative line-up of 'strict constructionist' judges who would, in theory, begin dismantling the legacy of Earl Warren, Hugo Black, William O. Douglas and the other Justices of the Warren Court era. With Lewis Powell's confirmation, Thurmond and Hollings had finally overseen the appointment of a conservative Southern judge on the US Supreme Court ... but from Virginia and not South Carolina.

### **Going Against the Brothers**

With the Republican Party back in control of the US Senate for the first time since the Eisenhower era, President Ronald Reagan would benefit from a valuable Republican ally as the new Chairman of the Senate Judiciary Committee – none other than South Carolina's Strom Thurmond. The Senator would continue his trend of supporting appointments of conservative Supreme Court Justices, and, as

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<sup>47</sup> Abraham, *Justices*, p.269-70.

<sup>48</sup> Dean, *The Rehnquist Choice*, p.265.

Chairman, he would oversee the confirmations of the first female nominee, Sandra Day O'Connor; the first Italian-American nominee, Antonin Scalia, and also – despite a second round of controversy over the aforementioned memorandum from 1952 – President Reagan's promotion of William Rehnquist to the Chief Justiceship following the retirement of Warren Burger.<sup>49</sup> The Chairman reportedly toasted Sandra Day O'Connor's confirmation in a manner 'more suited for a 1950s bride than for the newest associate member for the Supreme Court', with the truly Thurmond-like declaration, 'We love you for your beauty, respect you for your intelligence, adore you for your charm, and will come to love you ... because we can't help it.'<sup>50</sup> As noted in the previous chapter, Thurmond's role on the Judiciary Committee could now be utilised to ensure a smooth passage through the confirmation process for conservative nominees, and nowhere was this more evident than during the Robert Bork hearings of 1987, during which, as noted by Michael Comiskey, Thurmond protected the nominee repeatedly from difficult questions.<sup>51</sup>

However, the Democrats' success in regaining control of the Senate in the 1986 mid-term elections – which resulted in Thurmond being replaced as Judiciary Committee Chairman by Democratic Senator Joseph Biden of Delaware – suggested that Reagan's success in appointing solid conservatives to the Supreme Court might now be challenged if not curtailed. Furthermore, Thurmond knew he could not rely on the support of his independent-minded South Carolina colleague to support his preferences for judicial positions. Just as Thurmond had offered Donald Russell as an alternative to Fritz Hollings's recommendation of Clement Haynsworth in 1969, Hollings had offered African American Judge Matthew J. Perry as an alternative to Thurmond's choice of lawyer Emory Sneed for a newly-created seat on the Fourth Circuit Court of Appeals in 1984.<sup>52</sup> Ironically, Perry's appointment to the US Court of Military Appeals had been engineered by

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<sup>49</sup> *Ibid.*, p.278-9.

<sup>50</sup> Joseph Crespiro, *Strom Thurmond's America* (New York, NY: Hill and Wang, 2012), p.299.

<sup>51</sup> Michael Comiskey, *Seeking Justices* (Lawrence, KS: University Press of Kansas, 2004), p.45.

<sup>52</sup> 'Hollings Defends His Opposition to Sneed', *The Sumter Daily Item*, 27<sup>th</sup> July 1984, p.4B.



Thurmond back in 1976 when the latter was making one of many efforts to improve his standing with black voters.<sup>53</sup>

As the senior Republican member of the Judiciary Committee in the late 1980s, Thurmond was barely recognisable as the giant of Southern politics who had interrogated Thurgood Marshall and engineered the destruction of Abe Fortas's promotion to Chief Justice twenty years earlier. Robert Mann, who worked on the staff of Louisiana's Senator Russell Long before becoming a respected scholar of Southern politics, recalls that, by 1987:

Thurmond was really in his dotage. I would see him shuffle down the hall of the Russell Senate Office building on his way to the Senate floor or to a committee hearing. He looked old and bent over, like a man who had just a few years to live. Little did I know he still had many years ahead of him. Most famously, he dyed his hair ... When you saw him, it was hard not to stare at his orange-tinged head.<sup>54</sup>

Meanwhile, South Carolina's junior Senator was fast becoming one of the Senate's more distinctive and colourful Southern characters, as suggested by his participation as a member of the Senate Commerce Committee. One of the more bizarre moments in Senate history occurred during Commerce Committee hearings in 1985, when Fritz Hollings and Frank Zappa discussed the merits of including lyrics sheets within album packaging in order for parents to ensure that their children would not be exposed to inappropriate sexual or violent content. While the pair seemed to agree that lyric sheets would be preferable to a ratings system, if only to respect the fact that, in Zappa's words, 'not all parents want to keep their children totally ignorant', the Senator claimed, 'Well, what's – yeah, you and I would differ on what's ignorance and educated, I can see that,' to which an unimpressed Zappa responded, 'No, I happen to think you're very educated.'<sup>55</sup>

Hollings was not one of the critical figures in the Supreme Court nominations of Robert Bork in 1987 and Clarence Thomas in 1991, yet his role in

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<sup>53</sup> Bass and DeVries, *Transformation*, p.259.

<sup>54</sup> Letter from Robert Mann, 9<sup>th</sup> March 2015.

<sup>55</sup> Footage of Frank Zappa's testimony during Senate hearings into 'obscene' lyrics in rock music, and questions. [<https://www.youtube.com/watch?v=MMrL1SDkJRg>].

the outcome of each selection provides a further suggestion of his unique perspective on the judicial nominations process. Nearly twenty years on from his spirited defence of Haynsworth, he seemed no less enthusiastic about involving himself in controversy through backing divisive nominees for the nation's highest court. In the case of Robert Bork, President Reagan had selected a judge with impeccable conservative credentials but without considering the significance of timing. As Jan Crawford Greenburg has argued, Bork might have been confirmed in June 1986 had he been nominated for the vacancy left by William Rehnquist when the latter was appointed Chief Justice (a vacancy which was ultimately filled by Antonin Scalia). Instead, he was nominated to replace the outgoing Lewis Powell, who announced his retirement one year later, in June 1987, by which time the Democrats had taken control of Congress, and Reagan's approval ratings had dropped following the scandal of the Iran-Contra Affair.<sup>56</sup>

Having been overwhelmed by Bork's intellectual superiority, the Reagan Administration remained confident of the nominee's ability to handle the Judiciary Committee confirmation hearings, without ever formulating a plan to 'sell' Bork to the American people, and without anticipating the remarkably frank responses offered by Bork to his questioners.<sup>57</sup> One example is his exchange with Chairman Joe Biden regarding the *Griswold v. Connecticut* decision (1965), in which the Supreme Court struck down a statute preventing the use of contraceptives by married couples. Bork claimed that Justice William O. Douglas's concern for 'how awful it would be to have the police pounding into the marital bedroom' was a moot point because the Fourth Amendment prevented this scenario. In other words, 'the police simply could not get into the bedroom without a warrant.'<sup>58</sup> He was then pressed by Biden on the potential implications of the Connecticut statute:

**The Chairman:** If they had evidence that a crime was being committed –

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<sup>56</sup> Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York, NY: The Penguin Press, 2007), p.46-7.

<sup>57</sup> *Ibid.*, p.50-1.

<sup>58</sup> Footage of Bork Supreme Court confirmation hearings, 1987 [<https://www.youtube.com/watch?v=5ffTtOMIJAK>].

**Judge Bork:** How are they going to get evidence that a couple are using contraceptives?

**The Chairman:** A wiretap.

**Judge Bork:** Wire-tapping?

**The Chairman:** A wiretap.

**Judge Bork:** You mean to say that –

**The Chairman:** They – they have a legal wire-tap.

**Judge Bork:** You mean to say that a magistrate is going to organise a wiretap to find out if a couple is using contraceptives?

**The Chairman:** They could –

**Judge Bork:** No, it's –

**The Chairman:** - couldn't they, in law?

**Judge Bork:** Unbelievable. Unbelievable.

**The Chairman:** Let – no, I understand that, but under the law, Judge, could they not have – it was a crime, correct?

**Judge Bork:** It was a – it was a crime in – on the statute books, which was never prosecuted.

**The Chairman:** No, I –

**Judge Bork:** Never.

**The Chairman:** Well, the fact that it wasn't prosecuted –

**Judge Bork:** Well, let me –

**The Chairman:** - did not mean that it wasn't a crime, doesn't it?

**Judge Bork:** I have – I have more to say about that, whether it was a crime or not.<sup>59</sup>

Biden continued to press the issue by asking what would happen if a wiretap installed on the basis of a couple's involvement in illegal activity, such as drug dealing, happened to reveal that the couple had been using contraceptives. Appearing to stifle a giggle, an incredulous Bork asserted that 'nobody is going to get a warrant for that, and no prosecution is going to be upheld for that.'<sup>60</sup> Bork later sighed with frustration during questions from Senator Dennis DeConcini of Arizona on gender discrimination, and, when Senator Edward Kennedy of Massachusetts accused him of a 'bias against women and minorities in favour of big business and presidential power', an agitated Bork replied, 'Senator, if those charges were not so serious, the discrepancy between the evidence and what you say would be highly amusing.'<sup>61</sup> Thanks to the introduction of television cameras

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<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Ethan Bronner, *Battle for Justice* (New York, NY: Sterling, 1989), p.196.

for Sandra Day O'Connor's hearings in 1981, the confirmation process had become a remarkably public event by the summer of 1987, with millions of Americans watching these tense exchanges live, or as complete re-runs starting on C-SPAN at 8pm, or in the form of extended coverage on the evening news. In the view of Jan Crawford Greenburg, Bork's answers 'made him seem anything but witty, warm and responsive', and implied an arrogant attitude, which enabled his opponents to portray him as 'cold, uncaring and unsympathetic to the problems of ordinary Americans.'<sup>62</sup>

The Bork nomination showcased a notable explosion in interest group activity, with over three hundred groups mobilising in opposition to the nominee.<sup>63</sup> The grave concerns of Bork's opponents were articulated in a dramatic television commercial which chronicled Bork's conservative record on abortion and civil rights, and advised Americans, in the sobering tones of Hollywood actor Gregory Peck, to 'please urge your Senators to vote against the Bork nomination, because if Robert Bork wins a seat on the Supreme Court, it will be for life – his life and yours.'<sup>64</sup> In addition to the growing number of groups opposing Bork for his views on abortion and gender discrimination, Southern Senators with sympathy for the nominee's judicial philosophy had other reasons to hesitate before declaring their support. As Ethan Bronner has explained, in the most comprehensive study of the Bork nomination to date, the opposition of African American groups to Bork's confirmation was so virulent that most Southern Senators felt they had little choice but to oppose the nomination. Having adjusted to a transformed political landscape by showing greater sensitivity to black voters following the passage of the landmark Voting Rights Act of 1965, Southern Senators now felt compelled to vote against a highly-qualified yet ultra-conservative Supreme Court nominee, as the risk of losing black support made the pressure to oppose Bork in the Senate seem irresistible.

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<sup>62</sup> Greenburg, *Supreme Conflict*, p.51.

<sup>63</sup> Christine L. Nemacheck, *Strategic Selection* (Charlottesville, VA: University of Virginia Press, 2008), p.15.

<sup>64</sup> People for the American Way television film opposing the Supreme Court nomination of Robert Bork, 1987 [https://www.youtube.com/watch?v=NpFe10lkF3Y].

Having declared 'we're gonna go with the brothers on this one' with reference to the young black men on his staff, Louisiana's three term Democratic Senator, J. Bennett Johnston, presided over a meeting with other Southern Democrats, including his Louisiana colleague, John Breaux; David Pryor of Arkansas; Wyche Fowler of Georgia; Richard Shelby of Alabama, and Bob Graham of Florida. All would vote against the nominee.<sup>65</sup> Breaux later admitted that he 'didn't make the decision based on [Bork's] qualifications.'<sup>66</sup> Southern Democrats with much longer histories in the US Congress were inclined to agree with his outlook: Robert C. Byrd of West Virginia and John C. Stennis of Mississippi, both of whom had opposed the Voting Rights Act in 1965, also felt compelled to join the opposition. As one advisor to Chairman Biden observed, 'To see the reaction of white Southerners afraid to go back on civil rights was overwhelming.'<sup>67</sup> With the gradual expansion of Republican Party control throughout the Southern states, the Southern Democrat was on the road to becoming an endangered species by the late 1980s. As Nicol Rae has pointed out, Southern Senators 'had to face the new reality of Democratic Party politics in the South.'<sup>68</sup> Without solid black support, the survival of the Southern Democrat had become unthinkable in most instances.

It is highly significant that Fritz Hollings was the only Deep South Democrat who maintained his independence with regard to the Bork nomination. Crucially, Hollings's defence of Robert Bork suggests very personal reasons for refusing to join his Southern colleagues in opposing the nominee, and, perhaps more importantly, provides another example of the unique role of South Carolina in the nomination of Supreme Court Justices. Hollings's only practical involvement in the Bork nomination came in the form of three speeches made in the Senate. Shortly before the first speech, delivered on 8<sup>th</sup> October 1987, Hollings indicated in a letter to Atlanta's African American Mayor, Andrew Young, his concerns over Republican encroachment in the Southern states, explaining that, 'The situation is

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<sup>65</sup> Bronner, *Battle*, p.255-6.

<sup>66</sup> Rae, *Southern Democrats*, p.106.

<sup>67</sup> Bronner, *Battle*, p.259.

<sup>68</sup> Rae, *Southern Democrats*, p.105.

much like the Haynsworth nomination, which I handled. But be that as it may, I don't think we ought to hold up the judicial appointments like Thurmond did Fortas. We are being polarized too much now and we are fast losing our Democratic Party in the South.'<sup>69</sup> While only too happy to distance himself from his South Carolina colleague, Hollings's recollection of the Fortas and Haynsworth nomination disasters illustrates the extent to which these dramatic episodes in US politics – both of which featured the state of South Carolina in a leading role – had by now characterised the nominations process for Supreme Court Justices.

The text of Hollings's 8<sup>th</sup> October speech in defence of Bork suggests strongly that the Senator felt compelled to support the nominee because of his earlier association with Clement Haynsworth, and, more specifically, because of his personal view that a terrible injustice had been done to Haynsworth when the Senate rejected him in 1969. Opening with a lengthy and detailed account of how he had recommended Haynsworth to President Nixon and then attempted to steer the nomination through the Senate, Hollings reminded his colleagues once again of the events involved in the Haynsworth debacle, utilising his familiar tactic of blaming the Republicans entirely, before making a claim later repeated in his 2008 memoirs, that, following Haynsworth's rejection, 'at least seven Senators have individually recanted to me.'<sup>70</sup> Later in the speech, Hollings proved that he was no less aware than his colleagues of the pressure from black voters to oppose the nomination, when he claimed that his 1986 re-election victory was due in no small part to 'the overwhelming black support that I received' and admitted that the Executive Director of the South Carolina NAACP declared that 'if Hollings supports Bork, he might as well forget the black vote.'<sup>71</sup> Yet this was followed by a surprising admission that 'were it not for my experience in the Haynsworth defeat, were it not for the distinguished character and ability of Bork the man, it

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<sup>69</sup> Letter from Ernest 'Fritz' Hollings to Andrew Young, 2<sup>nd</sup> October 1987, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 379, Judiciary, Judges, Selection and Appointment, Supreme Court, Bork, Hearings, Sept 15-30, 1987, Statements, Hollings.

<sup>70</sup> Ernest 'Fritz' Hollings speech on The Nomination of Judge Robert Bork [first speech], 8<sup>th</sup> October 1987, p.1-2; Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 379, Judiciary, Judges, Selection and Appointment, Supreme Court, Bork, Hearings, Sept 15-30, 1987, Statements, Hollings.

<sup>71</sup> *Ibid.*, p.3-4.

would be easy politically to find something wrong or puzzling and vote “no” on Bork’, followed by the insistence that ‘being reminded time and again by strong supporters that this is a vote they won’t forget – and they won’t – makes it difficult to vote “aye”. But vote aye I must. For somewhere, sometime in this Senate we must stand up to the onrush of contrived threats and pressure.’<sup>72</sup>

In addition to suggesting that his personal involvement in the Haynsworth affair virtually compelled him to support Robert Bork, the Senator from South Carolina made a strong case for resisting pressure to oppose the nomination. In complete contrast to his Southern colleagues, who felt that demands from African American voters constituted an entirely logical reason to vote against the nominee, Hollings appeared to be implying that the overwhelming black opposition to Bork made it absolutely imperative that he assert his support for the nomination and resist caving in to ‘threats and pressure’ from the NAACP.

One of the more complex aspects of the speech is the bizarre manner in which Hollings attempted to portray Robert Bork as a racial moderate while at the same time praising the nominee for refusing to hide his genuine beliefs. Hollings was, of course, correct that ‘Judge Bork did not hide. He was forthright’, but Bork’s openness in articulating his judicial philosophy had reflected a deeply conservative interpretation of the US Constitution, thus contradicting entirely Hollings’s claim that Bork had worked to increase the ‘opportunities of blacks and women in this country.’<sup>73</sup> Interestingly, in an earlier draft of Hollings’s speech, from 7<sup>th</sup> October, the line dealing with Bork’s ‘forthrightness’ originally read ‘Judge Bork did not hide from his record’, but the words ‘from his record’ were removed and replaced with ‘He was forthright’, presumably in a bid to praise Bork’s honesty whilst avoiding drawing attention to the actual record.<sup>74</sup> While it may have been true that the nominee ‘was downright masterful in his more than sixty hours of testimony’, it seems unlikely that black South Carolinians were

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<sup>72</sup> *Ibid.*, p.4.

<sup>73</sup> *Ibid.*, p.4-5.

<sup>74</sup> Draft of Ernest ‘Fritz’ Hollings speech on The Nomination of Judge Robert Bork [first speech], 7<sup>th</sup> October 1987, p.3; Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 379, Judiciary, Judges, Selection and Appointment, Supreme Court, Bork, Hearings, Sept 15-30, 1987, Statements, Hollings.

reassured by Bork's constitutional expertise, especially when articulated in such a blunt, almost confrontational manner, and equally unlikely that they were reassured that Hollings had 'lived through those turbulent, troubled times in the South.'<sup>75</sup>

Throughout the remainder of the speech, Hollings's references to 'calls from my home state' were used not so much to acknowledge understanding, but in order to contradict the criticisms being made of Bork by South Carolina's black community. When he did introduce a black voice into the speech, it was that of Jewel Lafontant, former Deputy Solicitor General and former Secretary of the Chicago branch of the NAACP, who, according to Hollings, said of Bork, 'as a woman and a black woman ... let me tell you about the heart of the man ... I have no fear of entrusting my rights and my privileges to Robert Bork ... I sincerely believe he is devoid of racial prejudice.'<sup>76</sup> His use of Lafontant's sentiments to defend Bork recalled his earlier use of Ben Holman's words as a means of defending William Rehnquist during his troubled nomination as Associate Justice in 1971.<sup>77</sup>

Approaching the end of the speech, Hollings was careful to avoid offending fellow Democrats by removing a line arguing that 'Senators lining up against Bork are now suddenly becoming constitutional experts. The attempt is to dignify and obscure their local politics and dignify their decisions.'<sup>78</sup> He also removed the argument that 'we become a lesser body when we trash a distinguished judge ... It says to the country "give us Roman Hruska's mediocrity"', which, had that line been left in, would have offered Senators a reminder of the failed nomination of the undistinguished G. Harrold Carswell, and the catastrophic defence of that nominee by the Republican Senator from Nebraska, outlined in the previous chapter.<sup>79</sup>

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<sup>75</sup> *Ibid.*, p.4; p.6.

<sup>76</sup> *Ibid.*, p.6; p.9.

<sup>77</sup> Letter from Ben Holman to Ernest 'Fritz' Hollings, 4<sup>th</sup> November 1971, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 154, Judiciary, Supreme Court, General.

<sup>78</sup> Draft of first speech, 7<sup>th</sup> October 1987, p.9.

<sup>79</sup> *Ibid.*, p.5.



The most famous line from the speech, later repeated in Hollings's 2008 memoirs, is the judgement that 'We are governing by political poll. The most deliberative body in the world is becoming a rigged jury.'<sup>80</sup> Originally appearing, in the 7<sup>th</sup> October draft, in the section dealing with the 'contrived threats and pressure' of the NAACP, the line was relocated to a new section dealing with the intentions of the Founding Fathers, who 'crafted a disciplined, representative democracy', suggesting strongly that Hollings believed the line to contain his most powerful political point, and wanted to maximise the impact on his colleagues.<sup>81</sup> After the inclusion of Winston Churchill's claim that 'There is only one duty, one safe course, and that is to try to be right,' Hollings concluded his lengthy defence of Bork by quoting political commentator David Broder's view that 'it's something else when judges are lynched to appease the public.'<sup>82</sup> Aside from providing an unfortunate reminder of a barbaric practice that is frequently associated with the history of the American South, the final line of Hollings's speech would prove rather prescient, as those involved in the chaotic nomination of Clarence Thomas would discover during the late summer of 1991.

In the meantime, Hollings's characterisation of the Bork opposition as a 'lynch mob' provoked a public row with NAACP national board Chairman William Gibson, and confusion among Hollings's supporters, many of whom recalled that the Senator's past actions seemed favourable to the very groups now opposing Bork.<sup>83</sup> The day after he made the first speech, *The Spartanburg Herald-Journal* chronicled the debate within the Southern political science community over Hollings's support for Bork, suggesting that a consensus existed among South Carolinian academics that the junior Senator's position did in fact seem logical, given that, firstly, it would confirm Hollings's credentials as an authentic conservative, but also the fact that, secondly, the timing of the nomination would allow a sufficient period for Hollings to make amends before his re-election

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<sup>80</sup> *Ibid.*, p.5.

<sup>81</sup> *Ibid.*, p.4.

<sup>82</sup> First speech, 8<sup>th</sup> October, p.10.

<sup>83</sup> 'Hollings Expected to Weather Storm Over Bork', *The Spartanburg Herald-Journal*, 9<sup>th</sup> October 1987, p.B5.

campaign of 1992. As Charles Dunn of Clemson University argued, 'When the dust settles, both sides are going to understand and respect one another once again.'<sup>84</sup>

While Dunn's prediction ultimately proved correct, the criticism aimed at Hollings over his support for Bork prompted the Senator to make a second speech, on 22<sup>nd</sup> October 1987. Clearly upset that he had been 'publicly vilified' by black South Carolinians for making the 'arrogant' decision to support the Bork nomination, Hollings claimed to be 'hurt', and declared solemnly that 'after nearly four decades in public service, it is painful to have my civil rights bona fides impeached.'<sup>85</sup> In one of the most significant yet overlooked statements of his lengthy career, Hollings argued that Robert Bork, during his tenure as Solicitor General, 'argued more pro-civil rights cases than any Supreme Court nominee since Thurgood Marshall.'<sup>86</sup> It seems incredible that Hollings would seek to defend Bork by comparing him to Marshall, particularly given that it was during Bork's tenure as Solicitor General that he argued on behalf of the state of Michigan before the Supreme Court in the *Milliken v. Bradley* case of 1974, which, as Bob Woodward and Scott Armstrong have explained, resulted in 'the first major cutback in desegregation remedies by the Court since [Marshall] argued the *Brown* case nearly twenty years before.'<sup>87</sup> Far from proving his 'civil rights bona fides' as a Senator, Hollings's baffling comparison of Bork and Marshall succeeded only in dismissing the far more convincing civil rights record achieved by the Supreme Court's first African American Justice, whose nomination to the Court was, of course, opposed by Hollings in 1967.

On the other hand, with the chorus of condemnation drowning out the detail of the nominee's record, Hollings's defence did expose some of the lesser-known cases that Bork had been involved in as Solicitor General, the results of which betrayed the ruthless conservative persona being portrayed each night on

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<sup>84</sup> *Ibid.*, p.B5.

<sup>85</sup> The Nomination of Judge Robert Bork [second speech], 22<sup>nd</sup> October 1987, p.2; Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 379, Judiciary, Judges, Selection and Appointment, Supreme Court, Bork, Hearings, Sept 15-30, 1987, Statements, Hollings.

<sup>86</sup> *Ibid.*, p.3.

<sup>87</sup> Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon and Schuster, 1979), p.342. See also Chapter Nine, J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration, 1954-1978* (Oxford: Oxford University Press, 1979).

the evening news. One example offered by Hollings was the case of *Runyon v. McCrary*, in which Bork upheld civil rights laws preventing private schools from denying admission to black children.<sup>88</sup> James Clyburn, then serving as South Carolina's Human Affairs Commissioner, later claimed that his opposition to Bork 'may have been a horrible mistake.' With regard to Bork's role in *Runyon*, Clyburn expressed the view that 'I find it a bit hard to believe Mr Bork would have reversed himself on this very important issue. I admit, however, that I have no feel for what he may have done in other instances.'<sup>89</sup>

Hollings's final speech in defence of Bork was given on the same day that the Senate rejected the nominee by a devastating vote of 42-58, with Hollings and David Boren of Oklahoma the only two Southern Democrats to vote in favour of Bork's confirmation.<sup>90</sup> Making his final stand, Hollings outlined clearly his view that the duty of judges is to interpret the US Constitution with no regard for the actual political outcome of their decisions. This is evident in his claim that the criticism directed at Bork by interest groups resulted from their complaint 'that Judge Bork will not bend or ignore the Constitution in order to reach results they want but cannot achieve through the political process.'<sup>91</sup> In a blistering display of his conservative credentials, Hollings referred back to the 'marital bedroom' debate which had emerged during the hearings, insisting that 'when the ACLU and law professors like Larry Tribe say "right to privacy", they mean rights to obtain an abortion and engage in homosexual sodomy. You may be surprised to hear this because no-one opposing Judge Bork wants to talk about it.'<sup>92</sup>

Hollings's willingness to stand alone while his Southern Democratic colleagues pursued a different path was motivated as much by the unique political realities of his state as his own personal decisions. As Charles Dunn pointed out

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<sup>88</sup> First speech], 8<sup>th</sup> October 1987, p.6.

<sup>89</sup> 'Clarence Thomas Should Be Intensely Scrutinised But His Nomination Should Not Be Derailed' [statement by Congressman James Clyburn], undated, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 2.

<sup>90</sup> Nadine Cohodas, *Strom Thurmond and the Politics of Southern Change* (Macon, GA: Mercer University Press, 1995), p.492; Rae, *Southern Democrats*, p.105.

<sup>91</sup> The Nomination of Judge Robert Bork [third speech], 23<sup>rd</sup> October 1987, p.3; Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence, Box 379, Judiciary, Judges, Selection and Appointment, Supreme Court, Bork, Hearings, Sept 15-30, 1987, Statements, Hollings.

<sup>92</sup> *Ibid.*, p.3.

during the deliberations over Bork's confirmation, 'the damage to Hollings would have been greater had he hailed from another Southern state, where many Democratic incumbents were carried to office by an overwhelming black vote and little of the white vote.'<sup>93</sup> In contrast to Alabama's Richard Shelby, elected as a Senator in 1986 with a 50% share of the vote, winning 88% of the black vote and 38% of the white vote, Hollings was elected with 63% of the vote, taking 96% of the black vote and a whopping 56% of the white vote. Senators John Breaux of Louisiana and Wyche Fowler of Georgia were elected in 1986 with similar numbers to those of Shelby, with Breaux winning with 53%, taking 86% of the black vote and Fowler winning with 51%, taking 82% of the black vote, and each man taking 39% of the white vote in their respective states.<sup>94</sup> Breaux, Fowler and Shelby were all freshman Senators during the Bork episode, whereas Hollings, armed with seniority on Senate committees, was serving his fourth term. The fact remains that although Hollings acknowledged the potential dangers of alienating black support, his seniority combined with the make-up of the South Carolina electorate in the late 1980s resulted in a situation where he simply had less to lose than his fellow Deep South Democrats when supporting the nomination of Robert Bork and, four years later, the nomination of the equally controversial Clarence Thomas.

Following a second unsuccessful attempt to replace Lewis Powell – with Judge Douglas Ginsburg, whose name was withdrawn following the revelation that he had smoked marijuana while working as an Assistant Professor at Harvard University in the 1960s – President Reagan and the Senate finally settled on Judge Anthony Kennedy as the new Justice of the Supreme Court. Senators declined to fight the nomination, with John McCain of Arizona declaring that 'Nobody wants to go through that again. There's too much blood on the floor.'<sup>95</sup> After his arrival on the Court in February 1988, Kennedy, who today occupies the enviable position of the 'swing vote' on the US Supreme Court, was sent a friendly note by

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<sup>93</sup> 'Hollings Expected to Weather Storm Over Bork', *The Spartanburg Herald-Journal*, 9<sup>th</sup> October 1987, p.B5.

<sup>94</sup> Source: Joint Center for Political Studies, *The News*, 10<sup>th</sup> September 1991, p.7A.

<sup>95</sup> Henry P. Monaghan, 'The Confirmation Process: Law or Politics?', *Harvard Law Review* 101 (1988), pp.1202-1212, p.1209.

Justice Harry Blackmun, welcoming him to the 'good old Number Three Club', in reference to the fact that each man had been the third choice of the President who nominated him.<sup>96</sup>

### **Hell Hath No Fury**

Four years on from the Bork debacle, Fritz Hollings's sense of judicial conservatism was once again on display as he set out to defend President George H.W. Bush's nomination of Judge Clarence Thomas to replace Thurgood Marshall on the Supreme Court. The reaction of African Americans to the selection of a deeply conservative, anti-affirmative action African American judge as a replacement for the civil rights hero who had argued the *Brown* case was largely negative – film director Spike Lee famously referred to Thomas as 'a chicken and biscuit-eating Uncle Tom' – and Democrats in the Senate were divided, with many happy to see the continuation of the Court's 'black seat' but others underwhelmed by Thomas's conservatism and also the first notably lukewarm American Bar Association (ABA) rating since that given to the ill-fated G. Harrold Carswell in 1970.<sup>97</sup>

The nomination received a mixed reaction among prominent African Americans in the South: James Clyburn overcame his 'concerns' to speak favourably of Thomas's confirmation, stating 'if not Clarence Thomas, who? It is unrealistic to even think George Bush will nominate someone more sympathetic than Clarence is to the civil rights community's agenda', while Alabama's Congressman John Lewis, former head of the Student Non-Violent Co-ordinating Committee (SNCC), announced his opposition to Thomas, claiming 'Some have asked, "If not him, who?" That, to me, is not the issue. I would oppose any nominee who espouses the views that Thomas has espoused.'<sup>98</sup> To complicate

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<sup>96</sup> Greenburg, *Supreme Conflict*, p.70.

<sup>97</sup> Dennis S. Nordin, *From Edward Brooke to Barack Obama: African American Political Success, 1966-2008* (Columbia, MO: University of Missouri Press, 2012), p.25; David A. Yalof, *Seeking Justices* (Lawrence, KS: University of Kansas Press, 1999), p.111; Abraham, *Justices*, p.28.

<sup>98</sup> 'Clarence Thomas Should Be Intensely Scrutinised But His Nomination Should Not Be Derailed' [statement by Congressman James Clyburn], undated; 'He's Forgotten Where He's From', *Los Angeles Times*, 12<sup>th</sup> August 1991, Ernest F.

matters further, the confirmation hearings descended into chaos when law professor Anita Hill alleged that Thomas had behaved inappropriately and made sexually explicit comments to her on a regular basis when she worked for him at the US Department of Education, and later, when he served as Chairman of the US Equal Employment Opportunity Commission (EEOC). In defending himself before the Judiciary Committee, Thomas described his nomination hearings as ‘a national disgrace’, adding, ‘this is a high-tech lynching for uppity blacks who in any way deign to think for themselves.’<sup>99</sup> In addition to presenting yet another complex political dilemma for Southern Democrats, the Thomas nomination, in the words of David Bositis, ‘checkmated black activists, making it difficult for them to aggressively oppose a black nominee even though they dislike his views.’<sup>100</sup> Furthermore, as Michael Comiskey has shown, Thomas’s supporters were happy to argue that attempts to hold the nominee to a high standard could be perceived as racism, with memories of Strom Thurmond’s interrogation of Thurgood Marshall providing a useful historical reference point.<sup>101</sup>

The significance of the Bositis chessboard metaphor would not have been lost on Fritz Hollings, who clearly understood the racial dimension of the nomination, and appeared to agree with Clyburn’s ‘if not Thomas, who?’ perspective. In responding to criticism of the 43-year old Thomas’s limited judicial experience from a constituent urging the Senator to ‘tell Bush to try again’, Hollings wrote, on 25<sup>th</sup> September 1991, that ‘if you tell Bush to try again, you can bet your boots you’re going to get an Hispanic of the same ilk. Otherwise, take your criticism and go to the Marshall nomination. While Marshall argued more cases of a specific nature, no-one would have called him profound.’<sup>102</sup> The thick-skinned Senator continued shrugging off criticism from his constituents for

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Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 2.

<sup>99</sup> Footage of Clarence Thomas at Supreme Court confirmation hearings, 1991

[<https://www.youtube.com/watch?v=1IEEDD2vxaE>].

<sup>100</sup> ‘Southern Senators Tread Lightly on Nomination, *Orlando Sentinel*, taken from *The News*, 10<sup>th</sup> September 1991, p.7A.

<sup>101</sup> Comiskey, *Seeking Justices*, p.45-6.

<sup>102</sup> Letter from Ernest ‘Fritz’ Hollings to Bud Ferillo, 25<sup>th</sup> September 1991, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 1.

supporting Clarence Thomas. Following Thomas's confirmation, on 15<sup>th</sup> October 1991, by a wafer-thin margin of 52-48, Hollings received a note from his colleague on the Commerce Committee, Senator John Danforth of Missouri, who had been responsible for guiding Thomas through the troubled confirmation hearings. While Danforth thanked Hollings, claiming that 'during a time of glaring national attention and sometimes heated battle, I appreciate your support', Hollings received far less appreciative communications from disappointed supporters, prompting him to write several 'I'm sorry you feel as you do' responses, with one letter from 21<sup>st</sup> October offering a typically Hollingsesque assurance that 'my decision was not based on any poll. I've long since felt that polls are a curse of this profession and couldn't agree more about your analysis of the Bush Administration.'<sup>103</sup>

Hollings's support for Robert Bork had provoked gloomy predictions regarding the disappearance of his African American support, but the letters sent to the Senator's office during the Clarence Thomas controversy suggested the possibility of a far bigger section of the electorate deserting him in 1992. A report sent from Judith L. Lichtman, the President of the Women's Legal Defense Fund, provided an intensely critical perspective of Thomas's record on 'issues that have life-shaping importance to women and their families.' The assertion in Lichtman's accompanying letter, that 'this is a time when women, especially women of color who face double discrimination based on gender and race are even more vulnerable to invidious discrimination that threatens their security and personal freedom' would not have eased the complexity of the nomination from Hollings's point of view but it did provide a sudden injection of a non-white female point of view into the Supreme Court nomination process. The revelation of Anita Hill's allegations would add a new dimension to this development two months later. In another, equally notable, correspondence, Carolyn Hoover Sung, a native of Chester, South Carolina, complained to Hollings that:

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<sup>103</sup> Letter from John Danforth to Ernest 'Fritz' Hollings, 28<sup>th</sup> October 1991; letter from Ernest 'Fritz' Hollings to John L. Williams, 21<sup>st</sup> October; letter from Ernest 'Fritz' Hollings to Otis L. Guy, 21<sup>st</sup> October 1991, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 1.

The pictures of Strom arm in arm with Thomas were so revolting when I remember asking him to vote for the Civil Rights Bill in 1964 when I was a junior at Winthrop College. I just am sorry to see you on the same side as that old lecherous coot, who has harassed six generations of women (my aunt knew him in the early 1930s and he was still 'hands on' with the scholarship recipients in the 1960s at Winthrop). Next time will you try to remember the women?<sup>104</sup>

Hollings's typically idiosyncratic folksiness was laid on thick in his two-line response, which read simply, 'Thanks for your letter. I enjoyed it and my secretary especially loved it!'<sup>105</sup>

The anger of Hollings's female constituents over the Clarence Thomas nomination followed him all the way to his re-election campaign in 1992, and intensified following the announcement of the Court's *Planned Parenthood v. Casey* decision, which constituted the biggest threat to abortion rights since *Roe v. Wade* was handed down in 1973, but which ultimately upheld *Roe*'s constitutionality. Attorney Debra A. Faulkner, of Greenville, South Carolina, wrote to the Women's Alliance for Hollings on 9<sup>th</sup> September 1992 to announce that, despite her consistent support for the Senator over the years, she would not be voting for Hollings in future on account of his support for Clarence Thomas, citing Thomas's alignment with 'the right-wing conservative Justices who consistently chip away at Roe v. Wade.' In sections highlighted by a member of Hollings's staff, Ms. Faulkner claimed that the Senator 'will never receive my vote, the vote of any of my friends and colleagues who care about women's issues, or the vote of anyone that I can contact about this', adding that 'Senator Hollings ought to address this issue with his female constituency.'<sup>106</sup> A Ms S.J. Conner returned to Hollings a letter he had sent her on 27<sup>th</sup> August 1992, in which he had pointed out

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<sup>104</sup> Letter from Carolyn Hoover Sung to Ernest 'Fritz' Hollings, 18<sup>th</sup> October 1991; Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 3.

<sup>105</sup> Letter from Ernest 'Fritz' Hollings to Carolyn Hoover Sung, 24<sup>th</sup> October 1991, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 3.

<sup>106</sup> Letter from Deborah A. Faulkner to Ernest 'Fritz' Hollings, 9<sup>th</sup> September 1992, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 2.



his support for *Roe v. Wade* and his support for 'efforts to improve the choices available to women and to promote their economic and social equality.'<sup>107</sup> At the bottom of the letter, Conner had scrawled in pen her 'strong disagreement' with Hollings over the Thomas nomination, and outlined her concern that another anti-*Roe* Justice may be appointed in the event of President Bush's re-election later that year.<sup>108</sup> In the event, Hollings survived a strong Republican challenge from former Republican Congressman Thomas F. Hartnett, winning by 591,030 votes to 554,175, his narrowest margin of victory since the close contest against Marshall Parker in 1966.<sup>109</sup> As the junior Senator had discovered in his ill-fated primary challenge to Olin Johnston in 1962, seniority and incumbency have consistently proved to be the most powerful re-election weapons in South Carolina politics. Thirty years later, the seventy-year old Hollings – still the junior Senator due to Strom Thurmond's continued service – enjoyed the benefit of these important political assets, securing his fifth term in the US Senate.

The disappointment of black South Carolinians in Hollings's conservative view of judicial nominations would continue during the 1990s. His endorsement of Patrick Martin Duffy to replace the outgoing Matthew J. Perry on the United States District Court for the District of South Carolina was criticised by Fred Davis in *The Spartanburg Herald-Journal*, who complained that 'you don't just make a half-hearted effort to replace the state's only black federal judge, as the South Carolina junior US Senator has done, then expect the state's African American community to look the other way.'<sup>110</sup> On the other hand, Hollings did place a greater emphasis on the interests of female voters during his final election campaign in 1998. The Citizens' Committee for Ernest F. Hollings ran a television spot featuring two women from Camden, South Carolina who had been diagnosed with breast cancer. Fran DiBiase and Susan Makla claimed that Senator Hollings

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<sup>107</sup> Letter from Ernest 'Fritz' Hollings to S.J. Conner, 27<sup>th</sup> August 1992, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 3.

<sup>108</sup> Letter from Ernest 'Fritz' Hollings to S.J. Conner, 27<sup>th</sup> August 1992, Ernest F. Hollings Collection, Senate Papers, Legislative Files and Constituent Correspondence and Hollings Files, Box 421, Judiciary, Judges, Selection and Appointment, Supreme Court, Clarence Thomas, Folder 3.

<sup>109</sup> 'A Bitter Rivalry in South Carolina', *The New York Times*, 30<sup>th</sup> October 1992.

<sup>110</sup> 'Hollings Should Have Expanded His Search', *The Spartanburg Herald-Journal*, 26<sup>th</sup> June 1995, p.A8.

intervened personally on their behalf when their treatment was terminated by the US Food and Drug Administration (FDA). According to Ms DiBiase, 'When Senator Hollings came to my home, I was so excited. He entered my front door and I ran to him, and I grabbed him, and I just hugged him. He reminded me so much of my father. And the care, and the love, that he felt, was easy to see.'<sup>111</sup> With a huge campaign war chest ensuring blanket coverage of spots such as these, Hollings was returned to the Senate for his sixth and final term, during which he would briefly serve as the state's senior Senator following Strom Thurmond's retirement in January 2003.

### **The Perfect Outlet**

As with so many aspects of Fritz Hollings's colourful career, his participation in the nomination process for Supreme Court Justices seems characterised by contradictions. His supporters had good reasons for their confusion over the unusually conservative position adopted consistently by Hollings with regard to judicial nominations throughout the course of a thirty-eight year career in the US Senate. Despite his claim to support the preservation of the abortion rights established by *Roe v. Wade*, Hollings voted to confirm the nomination of Clarence Thomas, who later argued in his dissent in *Stenberg v. Carhart* (2000) that no right to an abortion was to be found in the US Constitution.<sup>112</sup> Despite his repeated complaints regarding the overwhelming influence of lobbying in US politics, Hollings voted to confirm the nomination of Lewis Powell, the author of the 'Powell Memorandum', a document sent by the future Justice to a friend at the US Chamber of Commerce, which later became massively influential in the rise of conservative lobbying organisations. For James Clyburn, the evolution of the lobbying industry was evident nearly forty years later in the Republican reaction

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<sup>111</sup> Citizens' Committee for Ernest F. Hollings television spot for re-election of Senator Ernest F. Hollings, 1998 [[https://www.youtube.com/watch?v=yZv\\_dDdaiqc](https://www.youtube.com/watch?v=yZv_dDdaiqc)].

<sup>112</sup> Greenburg, *Supreme Conflict*, p.178-9.

to the election of Barack Obama as President of the United States, not least in the comments of Mitch McConnell, the Republican Senate Minority Leader:

Mitch McConnell said that his number one priority was making sure Barack Obama was a one-term President. He didn't dream that up alone. They had a meeting the night of the inauguration, with him and not just the leadership in the Congress, but with the representatives of the Koch Brothers and all the people who were financing this stuff. These guys, they all had their roles to play, and they have methodically gotten their five votes on the Supreme Court. It didn't start with Obama's election. My theory is that it started with Lewis Powell and the Powell Manifesto.<sup>113</sup>

Shortly after becoming Senate Majority Leader on 3<sup>rd</sup> January 2015, McConnell declared that 'the Koch Brothers as citizens have every right ... to spend every penny they've got on political expression if they choose to. I don't think that's anything that threatens America's democracy.'<sup>114</sup> Despite his approval of Powell and other conservative judges, Hollings's comments on the influence of lobbying would suggest agreement with Clyburn. As recently as 2012, the former Senator was complaining that 'the lobbyists fix the vote now on the important issues and they absolutely – well, what's his name, Grover Norquist, he takes pledges and says not only that you can't vote for taxes, anything that affects taxes and an increase in taxes, you can't vote for it ... I mean, they run it. They run it. It's cash and carry government.'<sup>115</sup>

On the other hand, there are three theories to suggest that Hollings's conservative position on the nominations of Supreme Court Justices was perfectly logical. The first is the matter of inevitability: having become personally involved in the failed nomination of Clement Haynsworth, and so openly bitter about the Senate's failure to confirm the man he had recommended personally to Richard Nixon, Hollings may well have felt bound to vote for Robert Bork, not only to support the many statements he had made over the years in support of judicial restraint, but also as a means of reminding Senators of the injustice done to

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<sup>113</sup> Interview with James Clyburn, 3<sup>rd</sup> October 2014.

<sup>114</sup> 'McConnell: Unyielding on Iran, Defiant on Koch Brothers', *USA Today*, 28<sup>th</sup> January 2015.

<sup>115</sup> Andrew L'Hommedieu Interview with Ernest 'Fritz' Hollings, 20<sup>th</sup> June 2012, George J. Mitchell Oral History Project, Bowdoin Digital Commons [<http://digitalcommons.bowdoin.edu/mitchelloralhistory/200/>].

Haynsworth, who, like Bork, was in fact a distinguished and highly-qualified judge. Given the link between the failed Bork and Haynsworth nominations (and the obvious parallels between the nominations of Haynsworth and John J. Parker, discussed in the previous chapter), the limitations of analysing Supreme Court controversies as 'one-off' events – as outlined in research objective (3) – is once again evident.

Secondly, it is clear that Hollings saw the politics of the Supreme Court nomination process as a means of proving his conservative credentials. The need to make political gestures to indicate a conservative ideology became increasingly important for Hollings's survival as a Deep South Democrat. With public statements in support of judicial restraint, strict constructionism, and the intentions of the Founding Fathers, Hollings was able to build a conservative profile which would contain the Republican threat to his re-election efforts while at the same time asserting a traditional South Carolinian style of independence from the national Democratic Party. The course of Hollings's actions in the Supreme Court nomination process suggest that the conservative streak which was in evidence in the early phase of his career remained intact, although no longer in the form of a pro-segregation ideology. The frequent portrayal of Hollings as a forward-looking racial moderate – at least when compared to Johnston and Thurmond – has obscured a lengthy, distinctive conservative voting record which ensured his popularity with white conservatives and consistently disappointed his African American supporters.

Thirdly, the influence of the party dimension remained significant. Hollings was motivated throughout so much of his career by the need to retain a significant Democratic Party presence in South Carolina. Knowing that his survival could not be guaranteed simply by securing a huge majority of black voters in his state, Hollings regularly endorsed Republican Supreme Court nominees as part of a continued need to lure conservative whites away from the Republican Party. Just as Strom Thurmond aimed to build on the Republican party-building effort in the state by endorsing Donald Russell – a Democratic judge with a segregationist

background – Hollings aimed to prevent the exodus of white conservatives from the Democratic Party by endorsing Republican Clement Haynsworth. The impact of the confusing and ironic yet revolutionary changes in South Carolina's two-party system on the behaviour of the state's Senators in the nomination process for Supreme Court Justices cannot be overstated.

For those who credit Hollings with making an invaluable contribution to the peaceful desegregation of South Carolina, his assertion that judges have a duty to interpret the Constitution without regard to the outcome of their interpretations may seem puzzling. On the other hand, this view is in itself a conservative perspective which is shared by the Supreme Court's strict constructionist Justices, and might ultimately provide a true indication of an authentic conservative ideology on Hollings's part. His outlook seems very similar to the 'originalist' philosophy of Justice Antonin Scalia, by far the most outspoken conservative Justice on the Supreme Court, who has argued consistently that judges must interpret the words of the US Constitution according to their original meaning, leaving to legislators the job of determining the impact of a Court's decision on US society. For Scalia, this is the most appropriate means of interpreting the document because, as he claimed in 1997, 'it certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away.'<sup>116</sup> During the bicentennial celebration of the US Constitution in 1987, Justice Thurgood Marshall, only two months prior to Robert Bork's nomination to the Supreme Court, had offered a radically different perspective in a controversial speech, arguing that the system of government created by the nation's Founding Fathers 'was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government, and its respect for individual freedoms and human rights, we hold as fundamental today.'<sup>117</sup>

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<sup>116</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997), p.40.

<sup>117</sup> Tinsley A. Yarborough, *The Rehnquist Court and the Constitution* (Oxford: Oxford University Press, 2001), p.64-5.

The text of Hollings's defence of Robert Bork suggested that the Senator was no more willing to associate himself publicly with the views of Thurgood Marshall in 1987 than he had been twenty years earlier when opposing his nomination to the Supreme Court. His belief that judges should refrain from considering the potential political impact of their decisions reflects only his view of the role of judges, rather than his view of any of the issues that come before them. In other words, his attitude towards the nominations process was influenced to a great extent by the view that the judges are there to judge, and that his primary role as a legislator was to legislate. The unique manner in which Hollings stood by this principle is in itself a useful example of the fierce South Carolinian brand of independence that has characterised the behaviour of the state's politicians throughout history, not least with regard to the nomination of Supreme Court Justices. Although the ironclad control of South Carolina's segregationist political establishment had finally been broken by the Voting Rights Act of 1965 and the Court's *Stevenson v. West* decision of 1975 – which ensured the re-apportionment of the state's legislature – it is clear that the uniquely defiant South Carolinian approach to judicial nominations remained intact.

Before offering the closing remarks of the next, final, chapter in order to bring this thesis – and the story of South Carolina's war on the Supreme Court – to a conclusion, it is worth considering briefly the significance of Fritz Hollings's retirement in January 2005. For a period of one hundred and twenty-eight years, South Carolina was represented in the Senate by at least one, if not two, Democratic Senators. Following Hollings's departure from the Senate, the lengthy process of Republican party-building – to which Strom Thurmond had made such a significant contribution – appeared to be complete, with both Senate seats now held by Republicans. Former Congresswoman Liz Patterson, whose father, Olin Johnston, played a key role in protecting Democratic Party control in South Carolina, accepts the label of 'Deep South Democrat' only reluctantly, claiming, 'I don't particularly like the word "South" being attached to that, I just like to be a "Democrat." Somehow when you say "Deep South Democrat", it conjures up all

the things of the past about race. I mean, I think of some of the campaigns we've gone through here, not just with George Wallace, but now with the Tea Party and whatever. I'm sure there are some "Deep South Democrats" and that almost puts us in a category all of our own.'<sup>118</sup>

Patterson's notion of the unique existence of a Southern Democratic 'category' – supported in the work of scholars such as Nicol Rae – is evident throughout the story told in this and the preceding instalments of the thesis. The war of South Carolina's Senators on the US Supreme Court is in many ways the story of the Democratic Party in the South, from the era of Jim Crow segregation until the present day. South Carolina's transition to a more enlightened era of race relations may have been accomplished with relatively few incidents of violence and unrest when compared to other Southern states, and with a measure of responsible leadership which may have been sorely absent in the Alabama of George Wallace, the Arkansas of Orval Faubus, and the Mississippi of Ross Barnett. On the other hand, Olin Johnston, Strom Thurmond and Fritz Hollings opted to pursue an altogether more unique form of resistance within a very different arena of battle. The course of Hollings's career suggests that the conservative South Carolinian influence on the nomination process for judicial appointments provides perhaps the ultimate testament to the South Carolinian trait of resistance. Yet the resistance to the Court's desegregation order in *Brown* offers the historian only part of this story. The resistance of the state's Democratic Party to the development of a two-party system, culminating in the Republican Party's virtual takeover of the state, is a story with a much more recent conclusion.

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<sup>118</sup> Interview with Elizabeth J. Patterson, 29<sup>th</sup> September 2014.

## **CONCLUSION:**

### **A War on the Judiciary in the Southern Secessionist Tradition?**

*You suggested that I might give you some story about Senator Johnston that would enrich his biography. I do not know any story that would be particularly helpful to you.<sup>1</sup>*

Senator Wayne Morse of Oregon

It will never be known what Olin D. Johnston's pastor, John E. Huss, made of this comment from Republican Senator Wayne Morse. In responding to Huss's request that he offer a story which might 'enrich' the pastor's biography of South Carolina's senior Senator (published in 1961), Morse evidently decided to be candid in admitting his struggle to think of a story which would aid Huss's out-dated approach by portraying Johnston in an overwhelmingly positive light. Fortunately, Morse did then manage to offer an amusing reflection on Olin Johnston which has been included in this chapter as a final perspective on South Carolina's war on the US Supreme Court, not least because it offers some indication of the extent of South Carolinian influence in the US Senate.

When, in June 2015, South Carolina's Republican Senator Lindsey Graham announced that he was campaigning to secure the Republican nomination for the US Presidential Election of 2016, he made the unintentionally amusing comment, 'I won't run just to win in South Carolina.'<sup>2</sup> To some, this may have appeared to be a grand statement of the obvious, but for those with an inexplicable passion for the state's political history, the notion of a South Carolinian politician campaigning

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<sup>1</sup> John E. Huss, *Senator for the South: A Biography of Olin D. Johnston* (New York, NY: Doubleday, 1961), p.225.

<sup>2</sup> '2016 Candidate Lindsey Graham Has Problems At Home in South Carolina', *The Boston Globe*, 3<sup>rd</sup> June 2015.



for the Presidency solely for the benefit of his appeal to voters in South Carolina is hardly inconceivable. From the drama of the state's threat to secede from the Union during the Nullification Crisis of the 1830s to Strom Thurmond's breakaway run for President on a third-party ticket in 1948, to the aborted 2008 Democratic Party primary campaign of satirist and TV presenter Stephen Colbert – who announced that he would run only in South Carolina – the political history of the Palmetto State suggests that anything is politically possible. The involvement of South Carolina at the centre of important and surprising political events, particularly those relating to the state's struggle with its history of segregation, has been especially evident within a recent period of eight months. In December 2014, the conviction of George Stinney – the black teenager executed for the rape and murder of two white girls in a case widely believed to be a miscarriage of justice – was overturned after seventy years, while in January 2015, the 'Friendship Nine' protesters finally received an official pardon. The fatal shooting of Walter Scott, on 4<sup>th</sup> April 2015, drew South Carolina into the activities of the grassroots movement Black Lives Matter. The killing of nine people only two months later at the Emanuel African Methodist Episcopal Church in Charleston rocked the state to its foundations, resulting in a remarkable political consensus which ensured the controversial and highly symbolic removal of the Confederate battle flag from the State House grounds, on 11<sup>th</sup> July 2015.

South Carolina's dramatic political history suggests that a war of the state's politicians on the US Supreme Court was simply an inevitability. As explained in the Introduction, the very fact that the name 'Palmetto State' was adopted as a reminder of the spongy log walls of Fort Sumter, which absorbed the impact of British cannonballs in 1776, further suggests the pride taken by South Carolinians in gestures of defiance and defence. The frequent comments made regarding the comparatively smooth process of integration which occurred within the boundaries of the state during the 1960s have obscured the unusually abrasive behaviour of South Carolina's Senators within the walls of the US Congress. The horror of Preston Brooks's savage beating of Charles Sumner on the Senate floor

in 1856 established a pattern of violence and confrontation that became evident in the behaviour of subsequent notorious figures, albeit in diluted form, during the twentieth century. 'Cotton Ed' Smith's angry jabs at the arm of his chair with a penknife to get the Speaker's attention, Coleman Blease's recitation of *N\*\*\*\*\*s in the White House*, and Strom Thurmond's desperate attempt to physically drag Senator Ralph Yarborough of Texas into the Senate chamber to vote against his will, all suggest that the behaviour of South Carolina's politicians within the dignified institution of the US Senate has been anything but peaceful, and, some might add, anything but dignified.<sup>3</sup> With Senators taking the lead in resisting the Supreme Court's order to desegregate, it seems logical that the Senate, rather than the state itself, has served as the battleground for the state's gestures of defiance. The state's war on the Supreme Court illustrates best this largely overlooked phenomenon.

Through research objective (1), the thesis has argued in Chapters Four, Five and Six that, of all states, South Carolina has played the most important, although overlooked, role in the development of Supreme Court nomination hearings into political, and confrontational, public events. No other Deep South State has pursued such a spirited and consistent antagonism in the judicial selection process, and no Senator from any other Deep South state undertook a public one-man crusade against a particular nominee during the period under study. Research objective (2) has emphasised, in Chapters Three, Four and Five, that South Carolina provided the best example of a state's political agenda becoming evident on a national scale in the judicial nominations process throughout a lengthy period in the era of civil rights. Scholarly attention has been given to the role of the state's leaders in galvanising white voters in an anti-Court agenda, but little or none of the existing literature has focused on what the state's Senators actually did to combat the influence of the nine Justices, particularly through the process of appointing them. In emphasising research objective (3),

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<sup>3</sup> Joseph Crespino, *Strom Thurmond's America* (New York, NY: Hill and Wang 2012), p.173-4; 'Curtains for Cotton Ed', *Time*, 7<sup>th</sup> August 1944; 'Blease Poetry is Expunged From Record', *The Afro American*, 22<sup>nd</sup> June 1929, p.1; 'Southerners Who Refused to Sign the Southern Manifesto', in Anthony Badger, *New Deal/New South: an Anthony J. Badger Reader* (Louisville: University of Arkansas Press, 2007), pp.72-87; p.79-80.

the thesis has argued in Chapters Five, Six and Seven that analyses of Supreme Court nominations as 'one-off' events are ultimately restrictive and unhelpful. The thesis has shown that the intense conservatism of South Carolina's influence in all matters relating to the Supreme Court did not begin in 1954, nor did it end in 1970. Scholars have made clear distinctions between the lives and political careers of the three Senators under study, but this thesis has shown that the final votes on each of the Supreme Court nominations made during this period imply that no ideological difference existed between them whatsoever. On the other hand, the thesis has also shown that the standard method of analysing the nomination process by focusing solely on the outcome of each confirmation vote is particularly unhelpful in gaining a true understanding of the politics of the nomination process.

By way of research objective (4), the thesis has brought together the Supreme Court nomination process with the study of Southern political history – combining two worlds of the existing US politics literature which have rarely, if ever, been studied together – in Chapters Two, Four and Seven. The thesis has offered for the first time, in the form of research objective (5), a thorough and objective study of a ten-year period in the life and career of Olin D. Johnston following his election to the US Senate. With the current literature still lacking a comprehensive Johnston biography, and with the current tendency of writers to view Hollings's career by adopting the 'self-congratulatory' model of analysis, this thesis offers an unusually balanced account of the unique contributions made by Johnston and Hollings in the arena of judicial politics. The events of Chapters Two and Three have exposed the significance of Johnston in the relationship between judicial politics and Southern political history, particularly with regard to lower court nominations. These have also been emphasised through research objective (6), which has analysed the politicisation of appointments to the lower courts, particularly in Chapters Two, Three and Five.

This final chapter will provide an overview of the South Carolinian attitude toward the Supreme Court and will then offer an assessment of whether or not

the conduct of the state's politicians in waging war on the Court constituted a political success, before considering in depth the consequences of this war for the state's political development.

### **The Spirit of Calhoun**

The threat made by Vice President John C. Calhoun to lead his state out of the Union in 1832 proved to be the landmark political event that would define South Carolina, and the behaviour of the state's many flamboyant politicians, for generations. With Calhoun's belief that South Carolina's powerful economy was compromised by the Tariff of 1828, the Nullification Crisis began as a dramatic gesture of belief in South Carolinian exceptionalism, and the manner in which it concluded – in the form of the Compromise Tariff of 1833 – implied that Calhoun had achieved success by standing up to a popular President and protecting South Carolina's autonomy as a state.<sup>4</sup> On the other hand, as Walter Edgar has argued, South Carolina became deeply unpopular as a result of the Nullification Crisis, acquiring 'a reputation for rashness that lingered for a generation.'<sup>5</sup> When contrasted with the era of *Brown v. Board of Education*, during which South Carolina retained the support of other Deep South states in the fight to preserve segregation, the manner in which Calhoun's actions provoked unfavourable responses from states such as Mississippi and Georgia seems truly extraordinary.<sup>6</sup> With the tensions between Nullifiers and Unionists only worsening during the 1830s, Calhoun urged moderation, but, as Edgar notes, he would forever consider opponents of Nullification to be men 'who had not done their duty', a perspective which appears to support Tony Badger's claim of the state's politicians acting less through their convictions over the race issue, and more through a concern that they were 'too quiescent and resigned.'<sup>7</sup> James O. Farmer has argued that Olin

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<sup>4</sup> Walter Edgar, *South Carolina: A History* (Columbia, SC: University of South Carolina Press, 1998), p.330-1; p.337.

<sup>5</sup> *Ibid.*, p.337.

<sup>6</sup> *Ibid.*, p.337.

<sup>7</sup> *Ibid.*, p.338; Badger, 'From Defiance', p.134.

Johnston and state legislators need not have acted so drastically in their resistance to *Smith*, but concedes that a restrained response would have been out of character given their history, which taught them that ‘anything less than full vigilance against the black peril’ would undermine their prospects for re-election.<sup>8</sup> Calhoun’s expectation that Southern men – more specifically, men from South Carolina – would ‘do their duty’ in defending the autonomy of their region has clearly influenced several generations of South Carolinian leaders.

More than one hundred years on from the Nullification Crisis, with the state facing an equally imposing threat to its autonomy in the form of *Brown*, it may seem surprising that South Carolina’s legislature did not join the legislatures of Mississippi, Alabama, Georgia and Florida in declaring the Court’s decision null and void.<sup>9</sup> The failure to invoke the spirit of Calhoun during this critical moment in the state’s history may suggest that South Carolina’s political establishment felt no pressure to remind others in the Union of its defiant past. Alternatively, of the five Deep South states, only South Carolina had been involved in one of the decisions that formed the *Brown* case, and to respond by unleashing an outright claim of nullification might have undermined the repeated argument of the state’s leaders that the Court had created a problem that affected the entire Southern region. In March 1956, during the peak of Southern resistance to *Brown*, Governor James F. Byrnes appealed for calm with the statement that ‘South Carolina is not thinking in terms of secession. Fort Sumter is now a national monument to the opening battle of the Civil War and South Carolina is content to let it go at that.’<sup>10</sup> His claim that ‘the interposition resolution confines itself to protest and avoids any mention of “nullification”’ sounded as much like a reminder to his South Carolinian colleagues as an assurance to the rest of the Union that South Carolina would not repeat the rebellious actions which characterised its past. The determination of Olin Johnston, Strom Thurmond and Fritz Hollings to win

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<sup>8</sup> James O. Farmer, ‘Memories and Forebodings: The Fight to Preserve the White Democratic Primary in South Carolina’, in Winifred B. Moore and Orville Vernon Burton (eds.), *Toward the Meeting of the Water: Currents in the Civil Rights Movement of South Carolina During the Twentieth Century* (Columbia, SC: University of South Carolina, 2008), pp.243-251; p.249.

<sup>9</sup> Edgar, *South Carolina*, p.528.

<sup>10</sup> ‘South Carolina: New Schools Cited By Byrnes’, *The New York Times*, 12 March 1956, p.22.

election to the US Senate suggests their recognition of the need to work within the federal system, and their use of vaguely secessionist language for rhetorical impact (and the purpose of securing re-election) magnified not only their inability to exert the kind of influence which they claimed to wield, but also their tendency to take matters into their own hands without the full support of the Southern delegation – a tradition which Fritz Hollings would continue by supporting the conservative Supreme Court nominations of the 1980s and early 1990s. The struggle of the state's Senators to influence the nomination process for Supreme Court Justices remains an important yet overlooked chapter in the efforts of Southern politicians to impose a regional agenda on a national scale. Furthermore, South Carolina's role in that story highlights the relevance of state (in addition to 'regional') traditions during the most tumultuous period of social and political transformation in twentieth century US race relations.

Along with the underlying assumptions of the state's exceptionalism, the stand taken by John Calhoun came to symbolise the romantic image of the South Carolinian defiance of federal authority. Following the Civil War and the comprehensive drive to roll back Reconstruction through the implementation of Jim Crow segregation, the spirit of Calhoun lived on in the behaviour of South Carolina's Senators. As noted in Chapter Three, 'Cotton Ed' Smith's trump card in defeating Olin Johnston's challenge to his Senate seat in 1938 was his uncompromising stand on segregation. In reminding crowds of his infamous walk-out at the 1936 Democratic Convention in Philadelphia in protest at the invocation given by a black clergyman, Smith claimed that 'John Calhoun leaned down from his mansion in the sky and whispered in my ear, "You did right, Ed."'”<sup>11</sup> The aforementioned Senator Wayne Morse of Oregon responded to Strom Thurmond's aggressive promotion of the Southern Manifesto with the observation that 'you would think today Calhoun was walking and speaking on the floor of the Senate.'<sup>12</sup> Robert Mann has claimed that Senator Russell Long of

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<sup>11</sup> Edgar, *South Carolina*, p.507; Bryant Simon, *A Fabric of Defeat: The Politics of South Carolina Millhands, 1910-1948* (Chapel Hill, NC: University of North Carolina Press, 1998), p.205.

<sup>12</sup> Robert Mann, *The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights* (Orlando, FL: Harcourt Brace and co, 1996), p.163.

Louisiana secured Olin Johnston's support for his promotion to Assistant Majority Leader by giving him a desk that once belonged to Calhoun.<sup>13</sup> While the state's leaders may have opted to remain in the Union rather than make a dramatic gesture of secession worthy of Calhoun, the desire to re-capture South Carolina's authoritative voice in national affairs, which Congressmen and Senators had defended aggressively prior to the Civil War, remained a key motivator in the state's war on the Supreme Court.

### **The Success of Failure**

Any attempt to determine the success (or otherwise) of South Carolina's war on the Court is complicated by the inevitable claims of political historians that Southern segregationist politicians lacked a genuine belief that any form of 'massive resistance' would succeed.<sup>14</sup> This problem is particularly relevant when analysing the politics of the Supreme Court nomination process: as explained in the Introduction, an extraordinary collective effort is required if Senators are to engineer the rejection of a nominee, and, while presidents enjoy a wide range of administrative tools and the support of a large team of staff to promote a nominee, an individual Senator will carry the burden of proof when setting out to convince colleagues that a rejection is necessary.<sup>15</sup> Given that these conditions offer only a bleak chance of defeating a nomination, particularly when the objection rests on regional, or state, concerns, it seems logical that Southern Senators held out little hope of achieving victory in their obstruction to nominees.

On the other hand, despite the assumptions made regarding the lack of belief in any satisfying outcome in the drive for 'massive resistance', there remains a degree of exceptionalism in the case of Strom Thurmond. Anecdotal evidence suggests that Thurmond's Senate colleagues viewed him as a law unto

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<sup>13</sup> Letter from Robert Mann, 19<sup>th</sup> November 2014.

<sup>14</sup> See, for example, Badger's comments on South Carolina's politicians in 'From Defiance', p.128, and also Robert Mann's comments on Richard Russell's disillusionment in *Walls of Jericho*, p.366.

<sup>15</sup> Henry P. Monaghan, 'The Confirmation Process: Law or Politics?', *Harvard Law Review* 101(6), April 1988, pp.1202-1212.

himself, at least in terms of the extent of his belief in the sanctity of racial segregation. In addition to the alleged remark of Olin Johnston, mentioned in the Introduction, that Thurmond '*believes that shit*', Robert Mann recalls Senator Hubert Humphrey of Minnesota being asked if he thought that Louisiana's Russell Long genuinely believed all he had said during a stirring attack on the 1957 Civil Rights bill, to which Humphrey apparently replied, 'I don't think he believes a word he said. But that S.O.B., Strom Thurmond, does.'<sup>16</sup>

Others remain more sceptical. Robert Mickey has argued that Thurmond's 'Dixiecrat' run for President in 1948 was undertaken as a means of laying the groundwork for his challenge to Johnston in the Senate primary of 1950: with Johnston having established an unbreakable base of support in the upcountry, Thurmond's only chance of toppling his opponent lay in his ability to win over the conservative white voters of the state's 'black belt' region through a grand gesture of commitment to segregation.<sup>17</sup> John Spratt recalls that Thurmond 'was out there early on, with the issue of civil rights at the 1948 Convention. Clearly this helped him, he knew it was helping him, he was taking this position because it was advantageous to him politically. Strom would tell you he believed all this.'<sup>18</sup> The authenticity of Thurmond's views on segregation will always be questioned, but it is clear that his ideology was considered more orthodox than those of his Southern peers, and few would dispute the evidence indicating the extent to which he was willing to push the race issue in his pursuit of power and influence. The possibility offered by his biographer, Joseph Crespino, that Thurmond's orthodoxy was pursued in part to offset criticism in the event of his mixed-race daughter becoming public knowledge cannot be ruled out.<sup>19</sup>

It could, of course, be argued that the serious constraints faced by Senators when pursuing their grievances through the Supreme Court nomination process only highlight Thurmond's remarkable achievement in building a successful crusade to defeat the confirmation of Abe Fortas. Nonetheless, even

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<sup>16</sup> Mann, *Walls of Jericho*, p.197n.

<sup>17</sup> Robert Mickey, *Paths Out of Dixie* (Princeton, NJ: Princeton University Press, 2015), p.145-7.

<sup>18</sup> Interview with John Spratt, 28<sup>th</sup> September 2014.

<sup>19</sup> Crespino, *Strom Thurmond's America*, p.120.



with Thurmond's ground-breaking victory in the Fortas affair, the task of portraying South Carolina's war on the Supreme Court as a success remains challenging. Arguments can be offered to suggest a significant South Carolinian impact on the process, but these arguments are easily deflated by a lack of tangible results. For example, it could be argued that throughout the events discussed in Chapter Two, Thurmond and Johnston succeeded in creating a comprehensive anti-Supreme Court agenda that garnered the support of several Senators outside the South. Yet while their arguments over the Court's threat to national, rather than simply regional, interests might have provoked greater scrutiny over nominees while encouraging wider support for court-curbing legislation, the momentum of the growing anti-Court agenda proved insufficient in reducing the power of the Justices, and ineffective in forcing President Eisenhower to re-evaluate his methods of judicial selection, at least with regard to Supreme Court nominations. Neither Eisenhower nor Kennedy agreed to nominate Supreme Court Justices who would jeopardise the safety of *Brown*, although their willingness to appoint the favoured judges of Southern Senators to the lower courts did assist in the construction of a segregationist firewall, which would in theory protect the South from a federal erosion of states' rights. On the other hand, the firewall crumbled following the passage of the Voting Rights Act in 1965, forcing even Strom Thurmond to accept the reality of the desegregated South Carolina which Fritz Hollings had chosen to acknowledge years earlier.

The fact that South Carolina's war on the Court constituted a hugely significant component of the state's sustained resistance to the progress of civil rights is another factor that limited the success of the state's Senators. As Wayne Morse of Oregon has recalled, in an anecdote which probably should never have reached John Huss's biography:

When it was announced in the cloakroom that Olin Johnston had started to speak, one of his colleagues from a Southern state said, "What are we waiting for? We have plenty of time for eighteen holes of golf. Let's go." Then, like a group of schoolboys – after all, that is all United States Senators are, schoolboys grown up a bit – about eight of them left for the

golf course. When they came back to the Senate, it was almost dinner time, but Olin was still talking, and a note of thanks from the Senate truants who had played golf that afternoon was sent to Senator Johnston's desk.<sup>20</sup>

The story is clearly a reference to the 'tag team' system employed by Southern Senators in their use of the filibuster – which required one Southerner to hold the floor while his colleagues took a break, in a scheme designed to allow a continuous filibuster by eighteen Southern Senators – but the temptation to interpret Morse's choice of anecdote as an indication of the liberal Northern Senator's belief in the futility of Southern opposition to civil rights is irresistible.<sup>21</sup>

In addition to alienating Northern Senators, and aside from the practical difficulties involved in overcoming the challenges of the judicial selection process, there remains a more compelling case for South Carolina's failure in waging war on the Court. In the early 1960s, Johnston was receiving letters from a new generation of voters, one telling him, 'I am 22 – young America is watching more than you know', and another constituent informing him that 'the reactionary forces of bigotry and prejudice are on the wane.'<sup>22</sup> By the time of Thurgood Marshall's elevation to the Supreme Court in 1967, Johnston's desperate 1944 effort to maintain the all-white primary and Thurmond's 1948 segregationist campaign for the Presidency seemed woefully irrelevant and out-dated. As noted in Chapter Four, a *New York Times* article from October 1963 even speculated that an increasing African American voting bloc would in fact relieve South Carolinian politicians of 'the necessity of having to run on a racist platform.'<sup>23</sup>

The war waged on the Supreme Court may have satisfied South Carolina's conservative political establishment during this period, but sufficient evidence exists to suggest that Johnston, Thurmond and Hollings did in fact antagonise, frustrate and embarrass a great many South Carolinians with their attempts to

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<sup>20</sup> Huss, *Senator for the South*, p.225-6.

<sup>21</sup> Mann, *Walls of Jericho*, p.156.

<sup>22</sup> Telegram from Price Riley to Olin D. Johnston, 5<sup>th</sup> September 1962; letter from Bruce Tremain to Olin D. Johnston, 6<sup>th</sup> September 1962, Olin D. Johnston Collection, Senate Papers, Legislative Files, Box 101, Judiciary Committee, Appointments, Marshall, Thurgood, Folder 2.

<sup>23</sup> 'South Carolina Shuns Militancy', *The New York Times*, 26 October 1963, p.13.

influence the nomination process. The sheer volume of disapproval expressed in letters sent to the three Senators regarding their conduct in the judicial selection process would suggest that each of them overestimated the extent to which South Carolinians expected them to invoke the spirit of John Calhoun.

Perhaps inevitably, any debate over the success or failure of South Carolina's war on the Court will be influenced by whichever method is chosen by modern day historians to analyse the politics of the judicial nomination process. If they are to continue the existing trend of emphasising the outcome of confirmation votes in the Senate, then South Carolina's attempt to influence the nomination process will appear, once again, to be an abject failure given that only one unfavourable liberal nomination, that of Abe Fortas, was prevented, while South Carolina's Clement Haynsworth, supposedly the ideal nominee in the eyes of the state's conservative Senators, was rejected by the Senate. Furthermore, if Thurmond's tactic of opposing Fortas through offering a smorgasbord of criticisms – some of which did not relate to the nominee's qualifications – was intended as a drive to encourage a greater degree of scrutiny in the nominations process, it is difficult to argue with the theory that this venture backfired in the short term, with Senators retaliating by applying a similarly rigorous form of scrutiny in the case of Haynsworth. As noted above, a Senator carries a heavy burden of proof when opposing a presidential nomination, and even with considerable resources at the Senator's disposal, a successful attempt to build opposition to a Supreme Court nominee demands not only superior powers of persuasion but also overwhelming evidence of the nominee's lack of suitability.<sup>24</sup> To complicate matters, the Fortas, Haynsworth and Bork examples suggest that a rejection is possible only when the nominee's position on more than one political issue is objected to by a variety of powerful interest groups, or where ethical considerations exist on more than one level. Thurmond's campaign against Abe Fortas was successful in that it incorporated a wide range of criticisms, including the nominee's unusually close relationship with President Johnson; claims of the

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<sup>24</sup> Joel B. Grossman and Stephen L. Wasby, 'The Senate and Supreme Court Nominations: Some Reflections', *Duke Law Journal*, 560(3), August 1972, pp.557-591.

nominee's role in facilitating the spread of 'obscene' material; objections over the questionable payments he had received for his lecturing services, and, of course, his views on interpreting the Constitution, which supposedly leaned toward the much-derided 'judicial activism' of the Warren Court.

Apart from the fact that the record of rejections tells the historian very little about the substance of the Supreme Court nomination process and how it has evolved over time, it remains the case that, throughout the period under study in this thesis, the process developed into an arena of political debate which would transcend all notions of the Senate's function as a 'rubber stamp' for presidential nominations. Even in the absence of a controversial or divisive nominee, the process for confirming Justices of the Supreme Court continues to function as one of the most powerful – and, thanks to the introduction of television cameras in 1981, also one of the most public – outlets for Senators, interest groups and other public figures to debate the Court's influence on the political issues of the day. When considered from this perspective, it is clear that the actions of Johnston, Thurmond and Hollings did succeed in putting South Carolina at the forefront of a much wider campaign to check the power of the Supreme Court. With the increasing willingness of the nine Justices to exercise political influence in a multitude of policy areas, the Southern concerns over nominees' judicial experience would gain legitimacy, and the repeated criticism of the Justices for not applying the 'strict constructionist' approach of following the words of the Constitution as intended by the Founding Fathers would only gain momentum in the coming decades. Despite failing to hold back the dramatic expansion of the Court's power during this era, South Carolina's war did contribute to the development of a new level of Senatorial scrutiny while at the same time raising awareness of the Court's growing influence in all areas of the American polity.

Given that their actions throughout the period under study seem to be entirely consistent with South Carolina's reputation for rebellion and non-conformity, it seems ironic that the state's Senators appeared to enjoy some

success, perhaps unwittingly, in building a degree of consensus with regard to a much wider debate regarding the Supreme Court. Through the repeated reminder of the Justices' role in threatening national security by allowing the spread of communist subversion, South Carolina's war on the Court attracted the interest of conservative Republicans during the era of the McCarthy crusade. Later, during the 1960s, conservative Americans engaged in a drive for 'decency' were drawn into the war by the argument that a radical interpretation of the First Amendment was increasing the availability of pornographic material on newsstands and in movie theatres. Similarly, the accusation that the Court was undermining Christian values through the school prayer decision struck a chord with an equally sizeable religious element in US society. Liberal Northern Senators proved to be just as opposed to recess appointments as conservative Southerners, and the outbreaks of racial violence that occurred during the 1960s convinced many others of the credibility of Southern claims that the Justices were prioritising the constitutional rights of criminals over the safety of law-abiding citizens. Under the circumstances, it is perhaps unsurprising that the comprehensive anti-Court agenda crafted by Johnston and Thurmond became a crucial component of the highly politicised Supreme Court nomination process that was firmly in place by the late 1960s. The impact of South Carolina's crusade is also evident in the near-success of the HR3 bill in the summer of 1958, and also in the pressure exerted on Justices Brennan and Douglas to scale down their extra-curricular activities in 1969.

While the prospect of making an argument for success in South Carolina's war on the Supreme Court at the federal level continues to present challenges, it remains the case that the impact made by Johnston, Thurmond and Hollings on the political development of the state itself provides an opportunity to explore a very different analysis which offers two additional arguments in this concluding chapter. The first is that South Carolina's war on the Court was, of course, a rhetorical war first and foremost, allowing Senators to 'do their duty' by defending South Carolina and the Southern way of life. The Court provided the

most obvious, and most convenient, target for condemnation, enabling the three Senators to portray the Justices as a threat to national interests in a manner which would make clear their commitment to segregation yet without descending into the unfiltered racist demagoguery of a Benjamin Tillman or a Coleman Blease. The 'court-baiting' tactic seemed particularly logical to the three Senators when evaluating their prospects for re-election: as Chapter Three has shown, Olin Johnston escalated his lengthy obstruction to Thurgood Marshall's Second Circuit appointment while engaged in a lively primary contest, followed by an unusually strong Republican challenge in November 1962, and Chapter Four has explained that Fritz Hollings opted to vote against Marshall's 1967 appointment to the Supreme Court following a very narrow Senate election victory in 1966, while no doubt looking ahead to his re-election battle in 1968. The involvement of South Carolina's Senators in the nomination process enabled a powerful means of rallying the folks back home against a common enemy in a manner which would invoke the spirit of Calhoun, ensure re-election, and solidify seniority on Senate Committees. Richard Nixon's preference for 'strict constructionist' judges may have ushered in the final phase of South Carolina's war on the Court, but the need to push back against the Court's legacy under Earl Warren ensured that the rhetoric used by South Carolina's Senators in the nomination of new Justices remained largely unchanged thereafter.

Secondly, it is clear that the involvement of South Carolina's Senators in the nomination process served two very different party-building strategies within the state. Following his defection, Thurmond worked hard to maintain his base of segregationist support while building a solid Republican Party in South Carolina, while Johnston and Hollings spent much of their careers preventing white conservative voters from deserting the Democratic Party, with each succeeding in antagonising the state's African American population without compromising their share of the black vote. Through guiding a string of Republican nominees safely through a Supreme Court confirmation process in which he had once behaved as a titan of obnoxious obstructionism, Thurmond was able to promote the idea of the

Republican Party as the natural home for Southern conservatives. During the same era, the support offered by Hollings to the very same Republican nominees could be used to assure the state's Democratic loyalists that 'South Carolina Democrats' would continue to stand apart from the national Democratic Party. From this perspective, the unhelpful approach of analysing the Supreme Court nomination process through focusing solely on the outcome of each vote appears to present the ironic, and misleading, conclusion that no meaningful ideological difference existed between these very different politicians. Yet, as with the history of South Carolina itself, much of which remains unwritten, the preceding chapters have demonstrated that Johnston, Thurmond and Hollings were very different men who made highly unique contributions to the state's political development in a lengthy and extraordinary effort to scrutinise, obstruct and influence the Supreme Court nomination process.

### **A Note on the Future**

By offering a fresh perspective on the history of South Carolina's involvement in the fight against *Brown v. Board of Education*, it is hoped that this thesis will determine future directions for research into American political history, particularly as it relates to the American South. Perhaps the most significant and persistent gap in the current literature is the lack of a complete study of Southern dominance of Senate committees in the 1950s and 1960s. As noted in Chapter Two, the fact that Southerners were chairing fifteen Standing Committees of the US Senate by 1961 highlights a recurring theme of this thesis, namely, the fact that a regional agenda could easily be imposed on a national scale simply by Southerners achieving senior status through constant re-election.<sup>25</sup> While civil rights advocates were dismayed by a collection of elderly Southerners maintaining control over these committees, the age and outdated political philosophy of these

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<sup>25</sup> 'A Group with Real Power', *US News and World Report*, 21<sup>st</sup> March 1961, Edgar A. Brown Papers, Mss.0091, Johnston, Olin D., Box 30, Folder 390.

Southerners would eventually count against them, with ill health and the arrival of a newer generation of Southern politicians eventually diluting their influence over Senate rules and procedures by the mid-1960s.<sup>26</sup>

There are other possibilities for a more focused variety of research in the area of Southern influence over Senate Committees. James Eastland's leadership of the Judiciary Committee represents only one example of the many Southern Chairmanships of committees during this era, and only one example of the Southern segregationist influence on the Judiciary Committee itself. The Southern political literature would benefit from a full study of the Southern influence on the Senate Judiciary Committee throughout this era, focusing not only on Eastland (Mississippi), but also John McClellan (Arkansas), Sam Ervin (North Carolina), Olin D. Johnston (South Carolina), and Strom Thurmond (South Carolina). This thesis has provided insight into the South Carolinian influence, but a fuller study of all Southern Judiciary Committee members would build on it helpfully, if only in allowing further research into areas of interest mentioned in this study, but not discussed in great depth. For example, the research undertaken into the confirmation hearings of Potter Stewart, Thurgood Marshall, Abe Fortas and Clement Haynsworth suggests that Senator Sam Ervin of North Carolina proved to be unusually articulate, loquacious and good-humoured in his style of questioning, with his passion for law and his knowledge of the US Constitution quite evident even when expressing grave concerns over the judicial philosophy of the nominee. In stark comparison with Thurmond's provocative and embarrassing theatrics, Ervin's lengthy questioning of nominees played a vital role, perhaps unwittingly, in the development of Supreme Court confirmation hearings into an arena of exciting judicial and political debate.

Further suggestions for future research might include a study of the reactions of Committee members Ervin, McClellan and Thurmond to the *Miranda v. Arizona* decision, which would form the centrepiece of an ambitious project examining the significance of that landmark decision on the Southern states. As

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<sup>26</sup> Mann, *Walls of Jericho*, p.401.



noted in Chapter One, and also earlier in this concluding chapter, the current literature is sorely missing a comprehensive biography of the legendary Olin Johnston. A fresh biographical treatment of Johnston – offering the same modern and objective approach of Joseph Crespino in his study of Thurmond – would no doubt offer a valuable contribution to the political history of South Carolina from the New Deal to the era of the landmark Voting Rights Act.

Finally, a fresh study of the development of the Democratic Party in the Deep South would also constitute a valuable addition to the existing literature. As the story told in these pages has illustrated, the destruction of the once-immovable one-party system has reduced the South Carolina Democratic Party (SCDP) to a fraction of its former size, allowing it barely a sliver of the power and influence that Democrats enjoyed in the 1950s. Despite his optimism for the future of the party, the current Chair of the SCDP, Jaime Harrison, concedes that the development of the two-party system has done little to offset political, if not literal, segregation, with many conservative whites keeping their distance in the belief that the state Democratic Party now exists to represent African Americans. Robert McNair, whose period as Governor (1965-71) witnessed South Carolina's acceptance of racial integration despite the tragedy of the Orangeburg Massacre, wrote in his preface to Frank Jordan's legendary study, *The Primary State: A History of the Democratic Party in South Carolina, 1896-1962*, that 'Mr Jordan brings truth to his claim that the one-party system in South Carolina has been the "purest democracy found anywhere" because of the primary.'<sup>27</sup> Glancing down at the battered copy of Jordan's book lying on his desk (which, perhaps fittingly, was given to him by his counterpart in the Republican Party), an amused Jaime Harrison ponders his rise to the Chairmanship of the SCDP, and observes that 'the former Chairs would probably be rolling in their graves to know that the current Chair is a little African American kid from Orangeburg.'<sup>28</sup>

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<sup>27</sup> Frank E. Jordan, *The Primary State: A History of the Democratic Party in South Carolina, 1896-1962* (self-published; unknown date), p.v.

<sup>28</sup> Interview with Jaime Harrison, 3<sup>rd</sup> October 2014.

Despite the success of Barack Obama in substantially increasing African American voter turnout in South Carolina during the 2008 Presidential Election, the 2014 mid-term elections saw victories for Republican incumbents in one Gubernatorial, two Senatorial, and six out of seven House election contests, leaving Congressman James Clyburn as the state's one remaining Democratic representative in Washington, DC. The extent to which South Carolina's war on the Supreme Court had the strange effect of slowing the party-development process on the Democratic side, and accelerating it on the Republican side, suggests one further avenue of future research, particularly as the state's Democratic Party has reached a critical point in its history.

Until then, the story of South Carolina and the Supreme Court has allowed a fresh perspective on the state's crucial role in the development of judicial nomination hearings into confrontational public events. With the state's war on the Court offering the best example of a Southern state's political agenda becoming evident on a national scale, the thesis has shed light on the considerable influence of Senators Johnston, Thurmond and Hollings in the combative arena of judicial nominations. In showcasing a story that does not conform to the current Supreme Court nominations narrative, the thesis has argued against an analysis of nominations as 'one-off' events, and also demonstrated that the outcome of each confirmation vote has little use in constructing a thorough understanding of the politics of the nomination process. In focusing on the relationship between judicial politics and Southern political history, the thesis has highlighted the political significance of Olin Johnston's twenty years in the US Senate, and given long-overdue exposure to the intense politicisation of lower court, in addition to Supreme Court, nominations. On the one hand, the thesis has showcased an overlooked chapter in the history of Southern resistance to *Brown*. But, as the story told in these chapters indicates, the war of South Carolina on the Supreme Court transcended the issues of race and states' rights which informed 'massive resistance' and instead emphasised a

radical and ground-breaking response to the Court's consistent role as the final arbiter of policy in US society.

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